STATE OF CONNECTICUT *v.* AUSTIN GRANT HAUGHWOUT
(SC 20547)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

Syllabus

The defendant was convicted of one count of interfering with an officer, one count of disobeying the direction of an officer while increasing the speed of a motor vehicle in an attempt to escape or elude, and two counts of assault of a peace officer in connection with two separate incidents between him and certain police officers. During the first incident, an officer, S, turned his cruiser into a parking lot adjacent to a library at about 9 p.m. S observed the defendant walking quickly from a picnic table near the library to a parked vehicle in the lot. Once in the vehicle, the defendant took a few moments to set up a dashboard

camera in order to record the incident. Shortly thereafter, the defendant drove his vehicle toward the exit, S turned his cruiser's light bar on briefly, and S motioned with his hand for the defendant to pull alongside the cruiser, which he did. After a brief dialogue, S told the defendant to put his vehicle in park. The defendant ignored S's command and abrubtly began to drive toward the exit. S turned on his lightbar again and pulled his cruiser behind the defendant's vehicle. The defendant stopped, shouted to S, "hey asshole," and then proceeded to exit the parking lot and to drive north on a local road. Another officer, who had just arrived at the scene, and S pursued the defendant, and the defendant stopped a short distance up the road. After the defendant continued to argue with the officers and declined a request to provide his operator's license and registration, the officers let him leave the scene and applied for an arrest warrant. The second incident occurred when the defendant, in response to being informed by the police that they had obtained a warrant for his arrest, arrived at the police station. The defendant brought a video camera with him and began recording. The defendant was told by an officer, V, that he was in custody and under arrest. V also told the defendant that he had to secure the camera and that it would be returned. The defendant declined to surrender the camera and attempted to leave. A struggle between the defendant and V ensued, shortly after which another officer, D, came to V's assistance. Once the defendant was subdued, he was carried to the booking area. Before trial, the defendant moved to suppress evidence derived from the encounter relating to the first incident, claiming that S lacked a reasonable and articulable suspicion that the defendant had been engaged in criminal activity and that his detention was therefore illegal. The trial court denied that motion. On appeal from the judgments of conviction, the defendant claimed, inter alia, that the trial court improperly denied his motion to suppress and that the evidence was insufficient to support his conviction of both counts of assault of a peace officer. *Held*:

1. The trial court improperly denied the defendant's motion to suppress evidence relating to the first incident, as the defendant's detention by S in connection with that incident was unlawful, and, accordingly, the judgment of conviction of interfering with an officer and disobeying the direction of an officer was reversed; the defendant's conduct could not, in and of itself, give rise to a reasonable and articulable suspicion of criminal activity, as the totality of circumstances did not objectively indicate that the defendant was attempting to elude detection, there were no signs limiting access to the parking lot, members of the public frequently used the area after the library was closed in order to use the book drop and to access the library's free Wi-Fi, the fact that crimes previously occurred nearby did not alter this conclusion, and S's observation that the defendant walked quickly toward his vehicle fell short of the type of flight that has been found to indicate criminal behavior.

2. There was no merit to the defendant's claim that there was insufficient evidence to support his conviction of both counts of assault of a peace officer in connection with the second incident on the ground that the jury could not have reasonably found that the defendant had intended to interfere with the performance of either V's or D's duties or to cause D's injuries, and on the ground that the evidence did not support a finding that V's use of force was reasonable: the context afforded by the argument preceding the struggle at the police station, the defendant's attempt to leave the lobby, the fact that he kicked V multiple times, and the length of the struggle were facts from which the jury reasonably could have inferred that the defendant's resistance was undertaken with an intent to delay his arrest, and not the result of mere reflex; moreover, the evidence was sufficient to support the conclusion that V's use of force was reasonable, as V testified that he grabbed the defendant, who had been informed that he was under arrest, in order to prevent him from leaving the lobby and brought him to the ground only after the defendant began to struggle, V was outsized and alone at the moment the struggle began, and V never struck the defendant or resorted to the use of any type of weapon; furthermore, the jury could have reasonably concluded that the defendant injured D during the struggle, as D testified that he experienced neck and back pain as a result of the defendant's resistance and that he took time off from work to recover from those injuries.

3. The defendant was entitled to a new trial with respect to the count charging him with the assault of V, as the trial court improperly declined to instruct the jury that, to find the defendant guilty of that assault, it must first determine that V's use of force was reasonable, and, accordingly, the defendant was entitled to a new trial with respect to that count; nevertheless, the defendant could not prevail on his claim that the trial court committed reversible error by failing to instruct the jury, with respect to the charge relating to the assault of D, that the defendant's conduct must have been the proximate cause of D's injuries, as the trial court's instruction on causation was both legally correct and adequate when viewed in the context of the evidence presented at trial.

Argued February 24—officially released July 23, 2021*

Procedural History

Substitute information, in the first case, charging the defendant with the crimes of disobeying the direction of an officer while increasing the speed of a motor vehicle in an attempt to escape or elude an officer and interfering with an officer, and substitute information,

* July 23, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

in the second case, charging the defendant with two counts of the crime of assault of public safety personnel and one count of the crime of interfering with an officer, brought to the Superior Court in the judicial district of Middlesex, where the cases were consolidated and tried to the jury before *Suarez*, *J.*; thereafter, the court, *Suarez*, *J.*, denied the defendant's motion to suppress certain evidence; subsequently, verdicts of guilty; thereafter, the court, *Suarez*, *J.*, vacated the conviction of interfering with an officer in the second case and rendered judgments of conviction on the remaining counts in both cases, from which the defendant appealed. *Affirmed in part*; *reversed in part*; *judgment directed in part*; *further proceedings*.

Jennifer Bourn, supervisory assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Michael A. Gailor*, state's attorney, and *Russell C. Zentner*, senior assistant state's attorney, for the appellee (state).

Opinion

KAHN, J. The defendant, Austin Grant Haughwout, appeals from judgments of conviction on charges arising from, respectively, two separate incidents between him and various officers of the Clinton Police Department in July, 2015. The defendant claims that evidence of certain events during the first incident, which occurred in the parking lot of a local library on the night of July 19, 2015, should have been suppressed because those events were the result of an unconstitutional investigatory detention. The state responds to this claim by arguing that, in light of the totality of the circumstances presented, the police had a reasonable and articulable suspicion that the defendant had been engaged in criminal activity and that an investigatory detention was, therefore, constitutional under *Terry* v.

Ohio, 392 U.S. 1, 21–22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).[1] We disagree with the state and, accordingly, reverse the trial court's judgment of conviction as to the offenses relating to the incident that occurred on July 19, 2015. The defendant also claims that his conviction of two counts of assault of public safety personnel, specifically a peace officer, related to the second incident, which occurred inside of the Clinton Police Department on July 22, 2015, is infirm because (1) the state's evidence was insufficient to support his conviction, and (2) the trial court erred when instructing the jury. The state concedes that a new trial is required with respect to one of the assault charges due to instructional error but contends that the defendant's remaining claims lack merit. We agree with the state and, therefore, affirm in part and reverse in part the trial court's judgment of conviction related to the incident that occurred on July 22, 2015.

The following facts and procedural history are relevant to our consideration of the present appeal. Shortly after 9 p.m. on the evening of July 19, 2015, Officer Alexieff Adrian Santiago drove past the Henry Carter Hull Library in the town of Clinton and observed a vehicle parked in an unlit corner of an adjacent parking lot.[2] Although the library had closed earlier that day, Santiago testified that the public frequented the parking lot after hours to use the book drop and to access the

[1] Each of the charges related to this event stem from the defendant's refusal to comply with various orders by the police after his detention. In addition to his argument related to the motion to suppress, the defendant also argues that, if the initial detention was unconstitutional, he cannot legally be punished for ignoring the orders that followed.

[2] Santiago was conducting a routine patrol of the area in a marked police cruiser. Although Santiago testified that the library had been broken into once several years before and that a series of more recent larcenies had occurred at a nearby mall, the record contains no indication that the police had received any reports of crimes or other suspicious activity in the area on that particular evening.

library's free Wi-Fi.[3] Santiago turned his police cruiser around, drove into the parking lot, and observed a person walking "quickly" in the direction of the parked vehicle.[4] A few moments later, that vehicle began to drive toward the exit of the parking lot.[5] Santiago turned his cruiser's light bar on briefly and then motioned with his hand for the approaching vehicle to pull alongside of his cruiser. Santiago immediately recognized the defendant and asked him what he had been doing there. The defendant responded that he had been using the library's Wi-Fi at a picnic table adjacent to the parking lot but had left because he was being bothered by bugs.[6]

Santiago then decided to look behind the library and ordered the defendant to put his vehicle in park. The defendant then began to ask, repeatedly and continuously, whether Santiago suspected him of a crime. Santiago responded by telling the defendant, at least two more times, to put the vehicle in park. The defendant ignored those commands and abruptly began to drive toward the exit of the parking lot. While Santiago was turning his cruiser around to pursue the defendant, he noticed that a fence gate leading to a patio behind the library was open.[7] Santiago then turned on his light bar,

[3] Numerous photographs of the parking lot admitted into evidence at trial depict no posted rules restricting access to the parking lot or any signage prohibiting trespassing.

[4] Santiago gave the following specific testimony on this point: "By the time I got back, I saw the person was quickly going to their car and pulling out of the parking space as I pulled in . . . ."

[5] At this point, the defendant began recording a video on a dashboard camera. That video recording, which ran for the duration of the relevant events that evening, was admitted into evidence at trial.

[6] Santiago testified that he was skeptical of this explanation because individuals who access the library's Wi-Fi from the parking lot typically park closer to the entrance of the library in order to get a stronger signal. Santiago also testified, however, that there were no picnic tables near the entrance and that, although the signal might not be strong enough for tasks like "web surfing or streaming," a connection from that location was still possible.

[7] The record contains conflicting evidence about precisely when Santiago first observed the open gate. At some points, Santiago testified that he

pulled his cruiser up behind the defendant at the exit of the parking lot, and radioed for backup. The defendant stopped his vehicle, called out to Santiago by exclaiming, "hey asshole," and then continued to shout out of the window. As another officer arrived, the defendant pulled out of the parking lot and began to drive north on Killingworth Turnpike. The officers engaged their sirens and followed. Although the defendant came to a halt a short distance away, he thereafter continuously argued with the officers, refused to put the transmission of his vehicle into park, and repeatedly declined to provide his license and registration when requested. The police officers ultimately decided to let the defendant leave the scene and to apply for an arrest warrant based on his conduct.

On July 22, 2015, the police called the defendant and informed him that they had obtained a warrant for his arrest in connection with the preceding events. The defendant arrived at the police station at approximately 8 p.m. that evening. Prior to entering the police station, the defendant, using a small video camera, began a recording of the event by noting the date, time, location, and purpose of his visit and reviewing an inventory of items he was taking with him into the station. After entering the station, he was explicitly told by Officer Christopher Varone that he was in police custody and under arrest. At that time, Varone noticed that the defendant was carrying a small video camera and stated that, for safety reasons, it would not be allowed into the booking area. At least twice, Varone patiently stated that he would secure the device and return it after the defendant was released on a promise to appear. Varone

noticed the gate when he first entered the parking lot that evening. At other points, he testified that he had noticed the gate only after his initial conversation with the defendant. Although the trial court made no factual finding on this particular point, on appeal, the parties agree that Santiago's latter testimony reflects the actual sequence of events that evening.

repeatedly indicated that, if the defendant did not comply, he would soon be forced to do so. During the course of this discussion, the defendant declined to give up the camera several times. At first, the defendant asserted that he needed to keep the camera for his own safety but then later stated that he was just going to leave the camera in the lobby. The defendant then walked a short distance away and placed his camera down on top of a display case. Varone told the defendant that the police department would not be responsible for the camera if the defendant chose to leave it in the lobby. Shortly thereafter, the defendant picked his camera back up and turned to leave the station, stating that he was going to secure the camera himself.

Varone grabbed the defendant in order to prevent him from leaving the station, the defendant resisted, and a struggle ensued. Varone forced the defendant to the floor while the defendant began kicking Varone repeatedly. Moments later, Officer James DePietro, Jr., ran into the lobby and joined the struggle in order to assist Varone. DePietro audibly ordered the defendant, who was still "flailing about," "kicking," and "struggling" at the time, to put his hands behind his back. The defendant refused to comply and was eventually restrained. The defendant then repeatedly ignored commands to get up off of the floor and walk on his own into the booking area. As a result, he was carried to the booking area with the assistance of additional officers.

The jury's understanding of the events in the lobby that day was informed by no less than three separate recordings: (1) a video from the camera in the defendant's hand, which had audio; (2) a video from a security camera in the lobby, which did not; and (3) an audio recording from a cell phone hidden inside of the defendant's pants. The defendant's camera was turned off shortly after DePietro joined the struggle in the lobby. The cell phone hidden in the defendant's pants recorded

audio for the duration of the relevant events that day. The security camera recorded most of the events in the lobby, but was positioned at an angle that did not capture the portion of the incident that occurred after the defendant was on the floor. In addition, the evidence also included recordings from a camera in the booking area's cell block, which contain both video and audio, that show the defendant after he was carried out of the lobby.

Testimony offered at trial indicated that the defendant was about six feet tall and weighed approximately 160 pounds. Varone and DePietro were both physically smaller than the defendant. DePietro generally described the confrontation to the jury as follows: "It . . . just wasn't, you know, going to the ground and putting handcuffs on [the defendant]. It was a fight, a full on fight. And he's a little bigger than I am. But, even with . . . Varone and I, it was a full on fight." The defendant was eventually transported to a hospital by ambulance and then he was released back into the custody of the police. He was then taken back to the police station and processed without further incident.

Both Varone and DePietro sustained minor injuries that day. Specifically, Varone testified that the defendant had kicked him in the chest, face, and arm. Varone indicated that he experienced pain as a result of the kick to his arm, and a photograph was admitted into evidence showing light red bruising on the inside of his left bicep. Varone also testified that he injured one of his fingers while struggling with the defendant and that it went numb for a period of time. DePietro testified that his neck and back were "very sore from the fight" and that he ended up taking time off from work as a result.

The defendant was subsequently charged with various offenses for his conduct on both July 19 and July

22, 2015. Specifically, with respect to the incident that started in the library parking lot, the defendant was charged with interfering with an officer in violation of General Statutes § 53a-167a (a) and disobeying the direction of an officer while increasing the speed of a motor vehicle in an attempt to escape or elude in violation of General Statutes § 14-223 (b). With respect to the altercation at the police department, the defendant was charged with two counts of assault of a peace officer in violation of General Statutes § 53a-167c (a), relating to Varone and DePietro, respectively, and an additional count of interfering with an officer in violation of § 53a-167a (a), which related only to DePietro.

The two informations were consolidated for trial, and the jury returned verdicts finding the defendant guilty on all counts. The trial court vacated the defendant's conviction as to the interfering charge in the second case on double jeopardy grounds. The trial court imposed separate sentences of one year of incarceration, execution suspended, and one year of probation in connection with both of the charges in the first case. As to each count alleging assault of a peace officer in the second case, the trial court imposed a sentence of seven years of incarceration, execution suspended after one year, and five years of probation. The trial court specified that all four of the sentences were to run concurrently for a total effective sentence of seven years of incarceration, execution suspended after one year, and five years of probation. This appeal followed.[8] Additional facts and procedural history will be set forth as necessary.

In the present appeal, the defendant claims that (1) evidence of his conduct on the evening of July 19, 2015,

[8] The defendant appealed to the Appellate Court from the judgments of the trial court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

should have been suppressed by the trial court because it was obtained as a result of an unconstitutional investigatory detention by the police, and (2) the judgment of conviction arising out of the events that occurred at the police station on July 22, 2015, should be reversed because of insufficient evidence and instructional error. We address these claims in turn.

I

We begin with the defendant's claim that the trial court improperly denied his motion to suppress evidence relating to the events of July 19, 2015. In support of this claim, the defendant argues that Santiago lacked a reasonable and articulable suspicion that he had been engaged in criminal activity. The state expressly conceded at oral argument before this court that a reasonable person in the defendant's position would have believed that he was not free to leave the parking lot once Santiago motioned for the defendant's vehicle to pull alongside of his cruiser and that, as a result, a seizure had occurred within the meaning of our state constitution. See, e.g., *State* v. *Oquendo*, 223 Conn. 635, 653, 613 A.2d 1300 (1992). The state further conceded at oral argument that, if this court were to conclude that the trial court erroneously denied the motion to suppress, that conclusion would be dispositive with respect to the conviction relating to the events of July 19, 2015. However, the state claims that the investigatory detention of the defendant was reasonable in light of the totality of the circumstances known to Santiago at the time. For the reasons that follow, we disagree with the state.

The following additional facts and procedural history are relevant to our consideration of this issue. Before trial, the defendant moved to suppress "any and all evidence, including electronic audio and video recordings, and any statements obtained from the defendant,

that [derived from the] unlawful and unconstitutional seizure on July 19, 2015." In support of that motion, defense counsel argued that Santiago lacked a reasonable and articulable suspicion that the defendant had been engaged in criminal activity that evening. In response, the prosecutor argued that the defendant's presence in the parking lot, his movements after Santiago arrived, the explanation he subsequently gave for his presence, and the history of criminal activity in the area were sufficient to permit an investigative detention.

The trial court ultimately denied the defendant's motion to suppress, concluding, inter alia, that Santiago's initial orders were supported by a reasonable and articulable suspicion. In reaching this conclusion, the trial court reasoned: "Santiago saw a vehicle, it was in a dark area of the public library, and after hours, saw an individual getting into the car. Based on his beliefs of prior criminal activity in that area, based on his knowledge as a police officer that criminal activity occurred at the . . . [mall] next door, he had a suspicion, a reasonable and [articulable] suspicion to approach the car and [ask the defendant] some questions."

"Our standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Davis*, 331 Conn. 239, 246, 203 A.3d 1233 (2019). The question of whether a particular set of facts gives rise to a reasonable and articulable suspicion is a question of law over which we exercise plenary review. Id., 246–47.

"Under the fourth amendment to the United States [c]onstitution and article first, §§ 7 and 9, of our state constitution, a police officer is permitted in appropriate circumstances and in an appropriate manner to detain an individual for investigative purposes if the officer believes, based on a reasonable and articulable suspicion that the individual is engaged in criminal activity, even if there is no probable cause to make an arrest. . . . Reasonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police, would have had that level of suspicion. . . .

"[I]n justifying [a] particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion. . . . In determining whether a detention is justified in a given case, a court must consider if, relying on the whole picture, the detaining officers had a particularized and objective basis for suspecting the particular person stopped of criminal activity. When reviewing the legality of a stop, a court must examine the specific information available to the police officer at the time of the initial intrusion and any rational inferences to be derived therefrom." (Citations omitted; internal quotation marks omitted.) *State* v. *Clark*, 297 Conn. 1, 9–10, 997 A.2d 461 (2010).

Our analysis in the present case is guided in particular by this court's decision in *State* v. *Santos*, 267 Conn. 495, 838 A.2d 981 (2004). In that case, police officers reported seeing four men pacing nervously back and forth in a dark parking lot at night and stated that one of them smelled of alcohol. Id., 505–506. Several municipal athletic fields adjacent to that parking lot remained open to the public after sunset, but the area

was routinely patrolled at night because of previous criminal activity involving both drugs and prostitution. Id., 498. When questioned, the group of men told the police that they were " 'just driving around' " and that they had been wrestling with each other on the ground before the police arrived. Id., 499–500.

Although we acknowledged that the time of day and the history of criminal activity in an area can be relevant factors to consider in the course of such an analysis, we concluded that those factors alone were insufficient to create a reasonable suspicion that the defendant had been committing a crime. Id., 508–509, citing *Brown* v. *Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979) ("[t]he fact that [the defendant] was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that [the defendant] himself was engaged in criminal conduct"); see also *State* v. *Scully*, 195 Conn. 668, 679 n.15, 490 A.2d 984 (1985) ("[t]he lesson from *Brown* . . . is simply that physical presence in a geographical area where the police may have reason to anticipate possible violations of the law does not in and of itself justify arbitrary investigatory stops").

Our decision in *State* v. *Donahue*, 251 Conn. 636, 742 A.2d 775 (1999), cert. denied, 531 U.S. 924, 121 S. Ct. 299, 148 L. Ed. 2d 240 (2000), reached the same conclusion. In that case, the state argued that the police had reasonable suspicion to detain a defendant after his vehicle made an abrupt, but legal, turn into an unlit parking lot at 1:50 a.m. Id., 639–41, 647. As in *Santos*, the state relied on testimony demonstrating that the social club next to that parking lot had already closed for the evening and that the surrounding area had recently experienced a rise in criminal activity. Id., 639, 641. The trial court in *Donahue* declined to suppress the evidence that was discovered as a result of that detention, concluding that "there's a reasonable and

articulable suspicion that criminal activity was afoot when given the vicinity, the time of night the defendant pulls into the dirt parking lot of a club that is closed. And there's no other businesses in the area that could have been opened at that time. So I find that there was [a] reasonable suspicion to justify the stop at that time." (Internal quotation marks omitted.) Id., 641. This court reversed the judgment of the Appellate Court, which affirmed the trial court's judgment, concluding that the defendant's detention "was based on nothing more than the location of the defendant's vehicle at an early hour of the morning." Id., 637, 645. In reaching that conclusion, we noted that the defendant had committed no traffic violations, had not engaged in furtive conduct of any kind, and that the vehicle was unconnected to any ongoing police investigations. Id., 647.

The reasoning of both *Santos* and *Donahue* compels the conclusion that the defendant's mere use of the library's parking lot and picnic table at 9 p.m. on a Sunday evening cannot, in and of itself, give rise to a reasonable and articulable suspicion of criminal activity. See, e.g., *State* v. *Edmonds*, 323 Conn. 34, 68, 145 A.3d 861 (2016) ("[i]t is well established that the fact that a citizen chooses to stand outside at the dinner hour, in a neighborhood plagued by crime, does not warrant any reasonable and articulable suspicion that he himself is engaged in criminal activity"). As previously stated in this opinion, there were no signs limiting access to the parking lot, and members of the public frequently used the area after the library was closed. The fact that crimes had previously occurred nearby; see footnote 2 of this opinion; does not alter this conclusion. See, e.g., *State* v. *Oquendo*, 223 Conn. 635, 655 n.11, 613 A.2d 1300 (1992) ("[a] history of past criminal activity in a locality does not justify suspension of the constitutional rights of everyone, or anyone, who

may subsequently be in that locality" (internal quotation marks omitted)).

The additional facts relied on by the state to demonstrate the existence of a reasonable and articulable suspicion are insufficient to warrant a different result. First, Santiago's observation that the defendant was walking quickly toward his vehicle is of limited value. Even if that movement was occasioned by Santiago's arrival, a point that is neither specifically resolved by the trial court's factual findings nor entirely clear from the record, it would still fall short of the type of headlong flight that has been found to be indicative of criminal behavior in other contexts. See, e.g., *State* v. *Edmonds*, supra, 323 Conn. 72–73 ("[t]he mere fact that a citizen turns and walks away from an approaching police officer does not . . . support a reasonable and articulable suspicion of criminality" (emphasis omitted)); cf. *Illinois* v. *Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). The totality of the circumstances presented in this case also do not objectively indicate that the defendant was attempting to elude detection. Cf. *State* v. *Wilkins*, 240 Conn. 489, 493, 692 A.2d 1233 (1997) (ducking down in car to avoid being seen by police); *State* v. *Januszewski*, 182 Conn. 142, 144–45, 438 A.2d 679 (1980) (avoiding police by crawling out of passenger door of vehicle and under adjacent motorcycle) (overruled in part on other grounds by *State* v. *Hart*, 221 Conn. 595, 609, 605 A.2d 1366 (1992)), cert. denied, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1005 (1981); *State* v. *Watson*, 165 Conn. 577, 581, 585–86, 345 A.2d 532 (1973) (four individuals exiting vehicle behind closed restaurant and, minutes later, hurrying out from behind adjacent establishment to reenter same vehicle), cert. denied, 416 U.S. 960, 94 S. Ct. 1977, 40 L. Ed. 2d 311 (1974). Indeed, after returning to his vehicle, the defendant sat, stationary, for several moments in order to set up his dashboard camera and then promptly

brought his vehicle to a stop when signaled to do so by Santiago.

Santiago's initial reaction to the defendant's explanation that he had been using the library's Wi-Fi also does little to support the state's position given that Santiago himself recognized that members of the public frequently used the parking lot after hours for that exact purpose. Further, Santiago acknowledged that the Wi-Fi signal could well have been strong enough at the picnic tables for at least some purposes.[9] In light of these facts, we see no reason to conclude that the defendant's explanation for his presence was any more suspicious than the ones given to the police in *Santos*.[10]

In sum, Santiago's suspicion appears to have been based principally on the fact that the defendant happened to be present in the library parking lot at night and began to leave when Santiago arrived. Our precedent firmly establishes that such factors are, without more, insufficient to support a reasonable and articulable suspicion that criminal activity was afoot. Consequently, we conclude that the defendant's detention was unlawful and that, as a result, the trial court improperly denied his motion to suppress. The state has conceded, for the purpose of the present appeal, that this conclusion forecloses the imposition of criminal liability for the conduct that followed during the investigatory stop on July 19, 2015. The judgment of conviction as to the

[9] Although the defendant may not have parked in the same spot typically used by other Wi-Fi users, it is undisputed that he was still located on the side of the parking lot closest to the library and that the picnic tables were only approximately thirty feet away from the building. There is also no indication in the record that the defendant would have known that a stronger signal might have been available at another location.

[10] Because the parties agree that Santiago was unaware of the open fence gate when he seized the defendant; but see footnote 7 of this opinion; we need not consider that fact in our analysis. See *State* v. *Clark*, supra, 297 Conn. 9–10.

charges of interfering with and disobeying an officer related to that conduct, therefore, cannot stand.

II

The defendant's remaining claims of error relate to the two counts of the information in the second case alleging assault of a peace officer, which concerned the confrontation between the defendant, Varone, and DePietro that occurred at the Clinton Police Department on July 22, 2015.[11] The defendant argues that there was insufficient evidence to support either of those charges and that the trial court improperly declined to instruct the jury as to both counts. For the reasons that follow, with the exception of the claim of instructional error as to the assault count relating to Varone, we reject these claims.

A

Sufficiency Claims

The defendant raises three distinct claims relating to the sufficiency of the state's evidence. First, the defendant argues that he is entitled to a judgment of acquittal on both of the assault charges in the second case because the jury, based on the evidence presented at trial, could not have reasonably found that the defendant intended to interfere with the performance of either Varone's or DePietro's duties. Second, the defendant claims that his conviction for assaulting Varone must, likewise, be reversed because there was insufficient evidence to show that Varone's use of force was reasonable.[12] Finally, the defendant claims that his con-

[11] As noted previously in this opinion, the trial court vacated the defendant's conviction of interfering with DePietro in violation of § 53a-167a (a) on double jeopardy grounds prior to sentencing.

[12] Although the state has conceded that the defendant's conviction with respect to the assault on Varone must be reversed because of instructional error, we must still address the defendant's first two sufficiency claims because they would, if successful, entitle him to a judgment of acquittal on that charge. See, e.g., *State* v. *Padua*, 273 Conn. 138, 178, 869 A.2d 192 (2005) ("sound appellate policy and fundamental fairness require a reviewing court

viction for assaulting DePietro must be reversed because the jury could not have reasonably concluded that he had caused DePietro's injuries. The state disagrees with each of these claims, arguing that the various video recordings of the event and the testimony offered by the two officers at trial were sufficient to support the defendant's conviction. We agree with the state and conclude that the defendant's sufficiency claims lack merit.

The relevant standard of review is well established. "When reviewing a sufficiency of the evidence claim, we do not attempt to weigh the credibility of the evidence offered at trial, nor do we purport to substitute our judgment for that of the jury. . . . [W]e construe the evidence in the light most favorable to sustaining the verdict . . . . We then determine whether the jury reasonably could have concluded that the evidence established the defendant's guilt beyond a reasonable doubt. . . . [W]e do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Citations omitted; internal quotation marks omitted.) *State* v. *Lamantia*, 336 Conn. 747, 755, 250 A.3d 648 (2020); see also *State* v. *Ford*, 230 Conn. 686, 693, 646 A.2d 147 (1994) ("[w]e do not sit as the 'seventh juror' when we review the sufficiency of the evidence"). "A party challenging the validity of the jury's verdict on grounds that there was insufficient evidence to support such a result carries a difficult burden." (Internal quotation marks omitted.) *State* v. *Rhodes*, 335 Conn. 226, 233, 249 A.3d 683 (2020).

In order to prove a violation of § 53a-167c (a) (1), the state must establish that the defendant "(1) inten[ded]

to address a defendant's insufficiency of the evidence claim prior to remanding a matter for retrial because of trial error").

to prevent (2) a reasonably identifiable officer (3) from performing his duty (4) by causing physical injury to such officer . . . .'' *State* v. *Flynn*, 14 Conn. App. 10, 21, 539 A.2d 1005, cert. denied, 488 U.S. 891, 109 S. Ct. 226, 102 L. Ed. 2d 217 (1988); see also *State* v. *Casanova*, 255 Conn. 581, 592, 767 A.2d 1189 (2001), overruled in part on other grounds by *State* v. *Brocuglio*, 264 Conn. 778, 826 A.2d 145 (2003). ''If [a] police officer does not reasonably believe that his use of physical force is necessary, then his use of force is not within the performance of his duties and a citizen may properly resist that use of force.'' *State* v. *Davis*, 261 Conn. 553, 570–71, 804 A.2d 781 (2002).

The defendant first claims that no jury could reasonably conclude that he possessed an intent to prevent Varone and DePietro from performing their duties. Specifically, the defendant contends that the evidence presented at trial could reasonably support a finding only that he had panicked and lost control.[13] We disagree. The context afforded by the argument preceding the fight, the defendant's attempt to leave the lobby, the number of times he kicked Varone, and the overall length of the struggle that followed are all facts from which the jury could have reasonably inferred that the defendant's resistance was undertaken with an intent to delay his own arrest and not mere reflex. See, e.g., *State* v. *Porter*, 76 Conn. App. 477, 490–91, 819 A.2d 909 (sufficient evidence of intent to interfere with duties of officer in case in which defendant responded to attempted arrest by struggling with officer and striking him in face and shoulder) (overruled in part on other grounds by *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013)), cert. denied, 264 Conn. 910, 826 A.2d 181 (2003).

[13] We observe that defense counsel also made this particular argument during the course of closing arguments and that, in returning verdicts finding the defendant guilty, the jury implicitly rejected it.

The defendant's next claim is that the evidence admitted at trial was insufficient to support a conclusion that Varone's use of force was reasonable. Again, we disagree. Varone testified that he initially grabbed the defendant in order to prevent him from leaving the lobby and that he brought the defendant to the ground only after the defendant began to struggle in response.[14] The police had obtained an arrest warrant for the defendant, and, as stated previously in this opinion, Varone had already told the defendant multiple times that he was under arrest and in the custody of the police. Varone repeatedly offered to secure the camera for the defendant and to return it to him after he was processed and released on a promise to appear. At the moment the struggle began, Varone was outsized and alone. The testimony and exhibits offered at trial indicate that Varone never struck the defendant or resorted to the use of any type of weapon. These facts, although perhaps not conclusive, would have been sufficient to allow a properly instructed jury to conclude that Varone's decision to physically prevent the defendant from leaving the lobby and his decision to bring the defendant to the ground during the course of the struggle that followed were both reasonable when considered in context.

The defendant's final sufficiency claim is that the jury could not have reasonably concluded that he caused injuries to DePietro. This argument is adequately disposed of by DePietro's testimony that he experienced neck and back pain as a direct result of the defendant's resistance and that he took time off from work to

[14] The defendant's briefing appears to assume that Varone's decision to prevent the defendant's egress and his decision to bring the defendant to the ground were made simultaneously. Although the various recordings admitted into evidence undoubtedly show a rapid progression of events, the jury reasonably could have credited Varone's specific testimony to the contrary.

recover from that injury.[15] See General Statutes § 53a-3 (3) (" '[p]hysical injury' means impairment of physical condition or pain"); *State* v. *Cruz*, 71 Conn. App. 190, 214–15, 800 A.2d 1243 (concluding that definition of physical injury under § 53a-3 (3) applies to charge of assault of peace officer under General Statutes (Rev. to 1997) § 53a-167c), cert. denied, 261 Conn. 934, 806 A.2d 1067 (2002); see also Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. § 53a-3 (West 2007), commission comment (noting that statutory definition of physical injury is "intentionally broad"). Neither the absence of an observable physical condition nor the delayed onset of pain requires the conclusion that the state's evidence was insufficient to support the defendant's conviction.[16]

[15] The full colloquy between DePietro and the prosecutor reads as follows:

"Q. Now, as a result of this you were assisting . . . Varone did you, yourself, sustain any kind of an injury or any kind of pain, anything of that nature?

"A. Well, the next day, when I came into work, I had some neck pain and some back pain, I was very sore from the fight. It . . . just wasn't, you know, going to the ground and putting handcuffs on [the defendant]. [I]t was a fight, a full on fight. And he's a little bigger than I am. But even with . . . Varone and I, it was a full on fight. And the next day, you know, I was sore. My neck hurt and my back hurt.

"Q. Okay. And how long . . . did your back hurt you?

"A. Oh, I reported to Sergeant Dunn the next day that I was having the pain. Then I went into my days off, and I ended up taking one extra day off, which was a Sunday before I returned to work.

"Q. Because of the pain?

"A. Oh, yes, because of the pain."

[16] The defendant's initial briefing of this sufficiency claim focused on the issue of whether the state had proven a type of injury punishable under § 53a-167c, arguing that an interpretation of physical injury that encompasses an officer who merely feels "sore" would "lead to absurd and unworkable results . . . ." The state's brief responded in kind. In his reply brief, the defendant contended that his sufficiency claim with respect to DePietro had also focused on the issue of whether the defendant's *own volitional acts* had caused DePietro's injuries. Even if this latter claim had been raised distinctly in the context of the defendant's initial sufficiency argument, which it was not, we would reject it. DePietro testified that he was injured during the course of the fight itself; see footnote 15 of this opinion; and, as discussed previously, the jury could have reasonably concluded that the

See, e.g., *State* v. *Downey*, 69 Conn. App. 213, 217, 796 A.2d 570 (2002) (pain caused by kick to officer's leg was sufficient to support conviction); *State* v. *Mims*, 61 Conn. App. 406, 408–409 and n.2, 764 A.2d 222 (pain caused by kick to officer's left testicle was sufficient to support conviction notwithstanding fact that injured officer sought no medical attention and took no time off from work), cert. denied, 255 Conn. 944, 769 A.2d 60 (2001); *State* v. *Henderson*, 37 Conn. App. 733, 743–44, 658 A.2d 585 (testimony that victim experienced pain after being struck by defendant in her chest was sufficient evidence of physical injury to support conviction of third degree assault), cert. denied, 234 Conn. 912, 660 A.2d 355 (1995).

B

Instructional Error Claims

The defendant raises two separate claims of instructional error. First, with respect to the charge relating to the assault on Varone, the defendant claims that the trial court erred in failing to instruct the jury that, in order to find him guilty of that offense, it must first determine that Varone's use of force was reasonable. Second, with respect to the charge relating to the assault on DePietro, the defendant claims that the trial court improperly declined to instruct the jury that the defendant's conduct must have been the proximate cause of DePietro's injuries. We set forth the relevant standard of review and then address the defendant's two claims in turn.

"The standard of review for claims of instructional impropriety is well established. [I]ndividual jury instructions should not be judged in artificial isolation . . . but must be viewed in the context of the overall charge.

defendant had engaged in that struggle with the conscious purpose of delaying his own arrest.

. . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury. . . . A challenge to the validity of jury instructions presents a question of law over which [we have] plenary review." (Internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 528–29, 180 A.3d 882 (2018).

We begin with the first claim of instructional error, relating to the count of assault on Varone. On February 23, 2021, this court issued an order granting the defendant permission to file a supplemental brief addressing this additional claim of instructional error. In his supplemental brief filed pursuant to that order, the defendant claimed that the trial court improperly declined his request to instruct the jury as to whether it found that Varone's use of force was reasonable. See, e.g., *State* v. *Davis*, 261 Conn. 553, 570–71, 804 A.2d 781 (2002) ("If [a] police officer does not reasonably believe that his use of physical force is necessary, then his use of force is not within the performance of his duties and a citizen may properly resist that use of force. . . . [A] detailed instruction that the state must establish that the police officer had been acting in the performance of his duty and that a person is not required to submit to the unlawful use of physical force during the course

of an arrest, whether the arrest itself is legal or illegal, stands in lieu of a self-defense instruction in such cases. . . . [T]he failure to provide such instructions when the defendant has presented evidence, no matter how weak or incredible, that the police officer was not acting in the performance of his duty, effectively operates to deprive a defendant of his due process right to present a defense."). The state, in response, concedes that the trial court committed reversible error by omitting the requested instruction. Having reviewed the record, we agree with the parties and conclude that, as a result, the defendant is entitled to a new trial with respect to the assault on Varone charged in the first count of the information in the second case.

The defendant's second claim of instructional error relates to the charge arising out of the assault on DePietro. In particular, the defendant claims that the trial court committed reversible error by failing to specifically instruct the jury that, in order to find the defendant guilty of assault of a peace officer, as alleged in the second count of the information in the second case, the defendant's conduct must have been the proximate cause of DePietro's injuries. The state responds by arguing that the instruction given by the trial court on the topic of causation was both legally correct and adequate when viewed in the context of the evidence presented at trial. For the reasons that follow, we agree with the state.

The following additional procedural history is relevant to our consideration of this issue. The defendant submitted a request to charge on the counts of the information in the second case alleging assault of a peace officer. That proposed instruction indicated that the state bore the burden of demonstrating not only that the defendant's conduct caused the injuries to DePietro's neck and back, but also that the defendant's

conduct "was the proximate cause" of those injuries.[17] The trial court declined that request.

The trial court ultimately provided the following general instruction with respect to the first two counts of the information in the second case: "[A] person is guilty of assault of a peace officer when, with intent to prevent a reasonably identifiable peace officer from performing his duties and while such said peace officer was acting in the performance of his duties, such person caused physical injury to the peace officer." In a series of more specific instructions that followed, the trial court expressly informed the jury that the state bore the burden of proving that (1) "the defendant . . . caused physical injury to [DePietro]," and (2) the conduct specifically intended to prevent the performance of DePietro's duties must have been accomplished "by means of causing physical injury to [DePietro]."[18] We note that this language mirrors the relevant model criminal instruction. See Connecticut Criminal Jury Instructions 4.3-3, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited July 22, 2021).

Although the briefing on the question is not entirely clear, the defendant appears to contend that the jury could have possibly been misled in at least two distinct ways. First, the defendant argues that the trial court's instructions "virtually eliminated" the element of causation and that, as a result, the jury was given a false

[17] The defendant's proposed instruction on causation provided: "It is necessary . . . that the defendant's conduct is the cause without which the injury would not have occurred and the predominating cause or the substantial factor from which the injury follows as a natural direct and immediate consequence. In other words, the state must prove that [the defendant's deliberate conduct] . . . was the proximate cause of the [injury claimed]."

[18] The trial court's initial recitation of this instruction related to the first count of the second information, which alleged that the defendant had assaulted Varone. The trial court's instructions on the second count of that same information, which related to the assault on DePietro, simply referred the jury back to the instructions previously provided.

impression that DePietro's injuries need not have actually been connected to the defendant's conduct in any way. (Internal quotation marks omitted.) In support of this argument, the defendant has hypothesized that DePietro's injuries could have been caused by "shoveling snow" or "sleeping wrong." (Internal quotation marks omitted.) This argument is completely without merit. The court's charge, set forth previously in this opinion, clearly required the state to prove beyond a reasonable doubt that "the defendant . . . caused physical injury to [DePietro]."

Reduced to its essence, the defendant's principal argument on the point appears instead to be that, in the absence of the requested instruction on proximate causation, the jury was effectively relieved of the need to consider whether DePietro's injuries were a sufficiently direct result of an action undertaken with the requisite specific intent. We reject this argument as well. The trial court expressly instructed the jury that the specific intent required by the statute—namely, an intent to prevent DePietro from performing his duties—must have been effectuated "by means of causing physical injury to [DePietro]." In light of this instruction, we perceive no reasonable possibility that the jury could have been misled to believe that an injury caused without the required intent would suffice.[19] For the foregoing reasons, we conclude that the trial court's instructions, viewed as a whole, fairly presented the issues raised

[19] Even if some ambiguity remained on the point, the defendant still would not have been entitled to a more detailed instruction on causation because the evidence actually adduced at trial did not sufficiently develop an alternative theory of causation. Although testimony offered during the state's case-in-chief established that DePietro, together with the assistance of multiple other officers, had helped to move the defendant after the struggle in the lobby, the defendant made no attempt—through cross-examination or otherwise—to suggest that this activity had actually been the source of DePietro's injuries. Defense counsel's questioning of DePietro focused, instead, on the question of whether those injuries existed at all.

at trial and that, therefore, there is no reasonable possibility that the jury was misled. As a result, the defendant's claim of instructional error with respect to this charge must fail.[20]

In summary, we conclude that the trial court incorrectly concluded that Santiago possessed a reasonable and articulable suspicion to detain the defendant in the library parking lot on the evening of July 19, 2015. As a result of the state's concession that this conclusion is dispositive, the defendant is entitled to a judgment of acquittal on the two counts charged in the information in the first case. Because the state has also conceded the existence of a reversible instructional error with respect to the charge related to the defendant's assault on Varone, the defendant is entitled to a new trial on the first count of the information in the second

[20] In the closing pages of his principal brief, the defendant identifies a series of thirteen allegedly improper statements made by the prosecutor during the course of closing arguments. Of those, only four relate to the events that occurred in the lobby of the police department. In three of those four statements, the prosecutor simply prefaces an argument that the actions taken by the police that day were reasonable with the phrase, "I respectfully submit" or other language to the same effect. The state bore the burden of proving the point; see, e.g., *State* v. *Davis*, supra, 261 Conn. 570–71; and each of these three particular statements appears to reference only evidence contained within the record. Viewed in context, we do not believe that these remarks can be fairly characterized as a form of unsworn testimony. See, e.g., *State* v. *Luster*, 279 Conn. 414, 436, 902 A.2d 636 (2006). The singular comment that remains is a statement in which the prosecutor argued to the jury that the defendant would have been aware of the policy prohibiting the retention of personal effects in the booking area because he had previously reviewed the Clinton Police Department's manual pursuant to a freedom of information request. The defendant's briefing, however, contains no analysis as to how this particular comment, as distinct from his broader allegations that the prosecutor was "vouching" for the reasonableness of the conduct of the police, deprived him of his due process right to a fair trial. As a result, we conclude that the claim of prosecutorial impropriety with respect to that statement was inadequately briefed. See, e.g., *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016) ("[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly" (internal quotation marks omitted)).

case. Having concluded that the defendant's various claims with respect to the assault on DePietro lack merit, the conviction on the second count of assault in the second case must stand.

The judgment of conviction in the case relating to the events of July 19, 2015, is reversed and that case is remanded with direction to render a judgment of acquittal on all counts charged in that information; the judgment of conviction in the case relating to the events of July 22, 2015, is reversed only with respect to the count pertaining to the assault on Varone, and the case is remanded for a new trial with respect to that count; the judgment of conviction in the case relating to the events of July 22, 2015, is affirmed with respect to the count pertaining to the assault on DePietro.

In this opinion the other justices concurred.

STEPHANIE O'SHEA *v.* JACK SCHERBAN ET AL. (SC 20542)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

Syllabus

The plaintiff, who had run in the November, 2020 election to fill a vacant position on the Board of Education of the City of Stamford, appealed to the trial court, seeking to compel the defendants, including various city election officials, to seat her as a member of the board after she received the most votes for the position and the city determined that the vacant position had been included on the election ballot in error and declined to credit the election result. Pursuant to the applicable provisions (§ C1-80-2 (b) and (c)) of the Stamford charter, the city's Board of Representatives appointed the defendant H in February, 2020, to fill the vacancy until the next biennial election in November, 2021. In October, 2020, after ballots for the November, 2020 election were printed and sent to absentee voters, and the plaintiff and other individuals had registered as write-in candidates, the city discovered that the vacant board position had been placed on the ballot in error. City officials then met with the plaintiff and the other candidates to discuss the city's determination that, under § C1-80-2, biennial elections are held in odd

numbered years rather than in even numbered years and that H had been appointed to fill the vacant position until the next biennial election. The city further determined that it would be confusing to voters to print and distribute corrected ballots, given the short period of time before the election, and, thus, the election for the vacant position proceeded. The trial court rendered judgment for the defendants, concluding that the city charter unambiguously provided that H's appointment by the Board of Representatives placed her in the vacant position until the next biennial election in 2021. On appeal, the plaintiff claimed that the city was required to hold an election in November, 2020, to fill the vacancy on the board for the balance of the vacated term. She asserted, inter alia, that the term "biennial election" in § C1-80-2 should be construed to mean "the next town election" and that to construe "biennial election" to mean elections held in odd numbered years would violate various provisions of the federal and state constitutions. *Held*:

1. The plaintiff's claim that the term "biennial election" in § C1-80-2 should be construed to mean "the next town election" was unavailing, as that term refers to elections for vacant positions occurring every other year, which, in Stamford, are the odd numbered years: although the city charter did not define "biennial" and § C1-80-2 (c) did not specify whether the term "next biennial election" means even numbered years or odd numbered years, it was clear from looking at a related provision (§ C1-70-1) of the charter, which required elections to occur biennially beginning in 1953, that biennial elections were to occur in odd numbered years, and that conclusion was supported by the statutory (§ 9-164 (a)) requirement that municipal elections are to be held biennially; moreover, the requirement of the city charter's savings provision (§ C1-40-2) that the charter be construed in harmony with state statutory law did not compel the conclusion that the vacant board position was required to be filled at the next city election, as the relevant statute (§ 9-220) requiring vacancies to be filled at the next town election or at a special election allowed for other arrangements "as otherwise provided by law," and § C1-80-2 clearly provided otherwise; furthermore, contrary to the plaintiff's claim, a city charter provision that required a different schedule for vacancy elections than for regular elections would not yield absurd or unworkable results, and the doctrine of constitutional avoidance was inapplicable, as the charter was not genuinely susceptible to two constructions, and its plain meaning did not raise serious constitutional questions.

2. The plaintiff could not prevail on her claims that the first amendment to the United States constitution required the city to hold an election for the vacant board position at the next regularly scheduled city election, that is, in November, 2020, and that the city's failure to count and validate the votes for the position in the 2020 election unconstitutionally disenfranchised her: the plaintiff failed to clearly articulate a specific constitutional claim, and, insofar as she claimed that the city charter's

vacancy election provision, which required skipping the city's next regularly scheduled election at which a full-term board position would be on the ballot, was unconstitutional, it was well established that municipalities have vast leeway in the management of their internal affairs, including the flexibility to decide whether members of boards of education are elected or appointed; moreover, the federal constitution permits some delay in the holding of vacancy elections, and the plaintiff presented no authority to support her assertion that delaying the holding of a vacancy election until the next biennial election was unconstitutional; furthermore, the plaintiff's claim that she would be unconstitutionally disenfranchised unless the votes were counted and the result honored was unavailing, as the plain language of the charter made clear that no valid election could have been held, and this court was aware of no authority that constitutional principles required this court to validate a void election.

3. The plaintiff did not demonstrate that the state constitution required vacant board positions to be filled by an election, as opposed to appointment, as soon as possible, as the plaintiff advanced no authority and engaged in no analysis suggesting that the constitutional text or Connecticut or federal precedent supported her claim, and the state constitution contains no provision pertaining to the vacancy at issue.

4. There was no merit to the plaintiff's claim that the doctrine of municipal estoppel required the defendants to count the votes that were cast for the vacant board position: the plaintiff could not show that she would be subjected to a substantial loss if the votes were not counted because, under the city charter, there was no election in which she could run and, thus, no seat to lose; moreover, the plaintiff could not show that she lacked or had no convenient means of acquiring knowledge of the true state of things, as she could have avoided any harm that resulted from her misapprehension of the city charter by reading it or asking the city for clarification before registering as a write-in candidate, and the plaintiff had actual knowledge of the true state of affairs in October, 2020, when city officials met with her and other candidates after discovering that the vacant board position had been placed on the ballot in error.

Argued January 21—officially released July 26, 2021*

Procedural History

Action seeking a writ of mandamus compelling the defendants to seat the plaintiff as a member of the Board of Education of the City of Stamford, and for other relief, brought to the Superior Court in the judicial

* July 26, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

district of Stamford-Norwalk, where the court, *Genuario*, *J.*, granted the motion filed by Joshua A. Esses to intervene; thereafter, the case was tried to the court; judgment for the defendants, from which the plaintiff appealed. *Affirmed*.

Brenden P. Leydon, for the appellant (plaintiff).

Aaron S. Bayer, with whom was *Jenny R. Chou*, for the appellees (named defendant et al.).

Proloy K. Das, with whom was *Kevin W. Munn*, for the appellee (defendant Rebecca Hamman).

Maura Murphy Osborne, assistant attorney general, for the appellee (defendant Denise Merrill).

Joshua A. Esses, self-represented, the appellee (intervenor).

Opinion

D'AURIA, J. In this appeal, we must construe a Stamford Charter (charter) provision that controls the filling of vacancies on the Board of Education of the City of Stamford (board) and consider claims that, as applied to the circumstances of this case, both the provision generally and the actions of election officials specifically violate the federal and state constitutions. The plaintiff, Stephanie O'Shea, wanted to run in the November, 2020 election to fill a vacancy on the board and claims that she in fact ran in that election, won it and should be serving on the board presently. She brought suit when the city's election officials refused to credit the election results on the ground that the charter provides that the election to fill the vacancy could not be held until the "next biennial election" in 2021. Stamford Charter § C1-80-2 (b). She appeals from the judgment of the trial court rendered in favor of the defendants,

who are various city election officials and the secretary of the state.[1]

The charter contains two provisions that control the filling of vacancies in elective office. In the first instance, § C1-80-2 (b) of the charter provides that, when a vacancy occurs "in any elective office and no specific provision for filling such vacancy is made in this [c]harter, the Board of Representatives shall, within sixty (60) days following the vacancy, elect a successor to fill such vacancy until December first following the next biennial election." Stamford Charter § C1-80-2 (b). Section C1-80-2 (c) provides in relevant part: "When the Board of Representatives has elected a successor to fill a vacancy in the office of Mayor, on the Board of Representatives, on the Board of Finance or on the Board of Education as set forth above in [§] C1-80-2 (b), then and in that event, a vacancy election shall be held at the next biennial election. . . ." Stamford Charter § C1-80-2 (c). On appeal, the plaintiff contends that we should construe the phrase, "next biennial election," to mean "next city election." She also claims that, if next "biennial election" is held to mean elections held in odd numbered years, then § C1-80-2 (c) violates the first amendment to the United States constitution and article first, §§ 1, 2, 4, 5, 8, 14 and 20, as well as article sixth, § 4, of the Connecticut constitution. In addition, the plaintiff argues that the defendants' actions in refusing to count the votes cast for the vacant position in November, 2020, were unconstitutional under the first amendment

[1] The defendants are Lucy F. Corelli, in her official capacity as Republican registrar of voters; Ronald Malloy, in his official capacity as Democratic registrar of voters; Lyda Ruijter, in her official capacity as city and town clerk; Jack Scherban, in his official capacity as head moderator; and Denise Merrill, secretary of the state. The defendant Rebecca Hamman, in her official capacity as a member of the board, filed a separate brief. Intervenor Joshua A. Esses, who registered as a write-in candidate, also filed a separate brief. We refer in this opinion to Corelli, Malloy, Ruijter, Scherban and Merrill as the defendants, and to Hamman individually by name.

to the United States constitution. Finally, she claims that the doctrine of municipal estoppel should apply to prevent the defendants from refusing to count the votes.[2] We disagree with the plaintiff and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history, as stipulated by the parties, contained in the record, and found by the trial court, are relevant to this appeal. The charter provides for nine board members, with three positions up for election each year for three year terms. Stamford Charter § C1-80-5. In November, 2018, voters elected Frank Cerasoli and two other candidates to three year positions on the board. The term for Cerasoli's position ran from December 1, 2018, through November 30, 2021. Cerasoli vacated his position in January, 2020. Pursuant to § C1-80-2 (b) of the charter, in February, 2020, the city's Board of Representatives appointed the defendant Rebecca Hamman to fill the seat Cerasoli vacated, and she has served in that position since then.

By early October, 2020, ballots were printed for the November 3, 2020 election. The ballots included offices for president of the United States, United States representative, state senator, state representative, registrar of voters, three full-term Board of Education positions, and "Board of Education To Fill Vacancy for One Year." The board vacancy position did not have any party endorsed candidates. The ballots were sent to absentee voters.

The plaintiff registered as a write-in candidate for the board vacancy position on October 5, 2020. Hamman and the intervenor, Joshua A. Esses, also registered as

[2] The plaintiff also claims that the defendant Rebecca Hamman, a member of the board, and the intervenor, Joshua A. Esses, both write-in candidates for the vacant position that was placed on the ballot, are barred from seeking to void an election in which they participated. Because other claims by the plaintiff are dispositive, we do not reach this issue.

write-in candidates. On October 8, 2020, Stamford voter Eric Rota submitted an absentee ballot that included a vote for the plaintiff for the board vacancy position.

After questions were raised in the media regarding whether the ballot should have included the board vacancy position, the town clerk asked the city's corporation counsel, Attorney Kathryn Emmett, for an opinion on whether an election should take place for the position. On October 16, 2020, the mayor, David R. Martin, and Attorney Emmett met with the plaintiff, the party endorsed candidates for the three full-term board positions, and others. During that meeting, Mayor Martin discussed Attorney Emmett's conclusion that, under the charter, there could be no election for the position in 2020 and that the position had been included on the ballot in error. Mayor Martin also discussed the city's view that, because overseas and military ballots had already been printed and mailed, it would be problematic and confusing to voters to print and distribute corrected ballots given the short period of time before the election.

The same day, Attorney Emmett issued a legal opinion concluding that, under § C1-80-2 of the charter, "after the Board of Representatives has elected a successor to fill the vacancy . . . a vacancy election shall be held at the next biennial election" and that "biennial elections are held in odd-numbered years." The opinion concluded by stating that "there is currently no one (1) year term vacancy to fill on the Board of Education because Rebecca Hamman has been elected by the Board of Representatives to fill the partial term seat until the 2021 biennial election."

On October 20, 2020, Attorney Emmett participated in a conference call with Director of Elections Theodore Bromley and Staff Attorney Aida Carini, both from the Office of the Secretary of the State (secretary). Bromley

and Attorney Carini informed Attorney Emmett that the secretary would not require the city to reprint the ballots and that the secretary would not take a position on whether there was a valid election for the board vacancy position because that was a question of municipal law. Bromley and Attorney Carini also indicated that, given Attorney Emmett's conclusion that there was no valid election for the position, the secretary expected that the city would report no election results for that position.

On October 21, 2020, Mayor Martin and Attorney Emmett met again with the plaintiff, party endorsed candidates for the three year positions on the board, and others. At this meeting, Mayor Martin informed the participants that the ballots would not be reprinted and related that the secretary expected that the city would report no election results for the board vacancy position.

On November 5, 2020, the following numbers of votes for the board vacancy position were reported in the secretary's election management system: Esses, 2; Hamman, 21; and O'Shea, 578.[3] Nonetheless, on November 9, 2020, the city's head moderator, defendant Jack Scherban, submitted a final report and certification of votes to the secretary that did not include any votes for the position.

The plaintiff brought this action pursuant to General Statutes § 9-328, claiming that the charter, either by its terms or by a construction consistent with various federal and state constitutional provisions, required the city to hold an election in November, 2020, to fill the vacancy for the balance of the vacated term. The defendants contended to the contrary that the charter unambiguously provides that Hamman's appointment by the Board of Representatives filled the vacated position

[3] The four candidates for the three full-term board seats on the ballot received between 22,190 and 35,252 votes each.

until November 30, 2021. The trial court held that the charter provisions clearly and unambiguously provided that Hamman's appointment by the Board of Representatives placed her in the vacancy position until November 30, 2021.

The trial court rendered judgment in favor of the defendants, and the plaintiff appealed to the Appellate Court. We then transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Following oral argument, we issued a ruling from the bench on January 21, 2021, affirming the trial court's judgment. We indicated at that time that a full opinion would follow. This is that opinion.

I

The plaintiff first claims that we should construe the term "biennial election" in § C1-80-2 of the charter to mean "the next town election." We disagree. The term "biennial election" unambiguously refers to elections occurring every other year, which, in Stamford, are the odd numbered years.

The plaintiff does not argue that the term "biennial election" is ambiguous. Rather, she contends that, at the time the charter was written, the phrases "biennial election" and "the next town election" were interchangeable because the city held no elections in the intervening years. This fact, she argues, demonstrates original legislative intent, and we, therefore, should construe the charter consistent with this intent. The plaintiff further argues that interpreting "biennial election" to mean "the next town election" is necessary to harmonize the charter with General Statutes § 9-220.[4] Finally,

[4] General Statutes § 9-220 provides: "If any town office in any town is vacant from any cause, such town, if such office is elective, shall, except as otherwise provided by law, fill the vacancy at the next town election or at a special election called for such purpose in accordance with the provisions of section 9-164, but, until such vacancy is so filled, it shall be filled by the selectmen. The selectmen shall fill all vacancies in offices to which they have the power of appointment."

the plaintiff argues that such a construction is necessary to avoid first amendment and fourteenth amendment due process concerns. We address each of these claims in turn, applying General Statutes § 1-2z and our familiar principles of statutory construction to the charter provisions. See *Russo* v. *Waterbury*, 304 Conn. 710, 720, 41 A.3d 1033 (2012). We also apply the same plenary standard of review to the trial court's interpretation of the charter as we would to a court's construction of a statute. See *Cook-Littman* v. *Board of Selectmen*, 328 Conn. 758, 767–68, 184 A.3d 253 (2018).

We first consider the text of the statute itself and its relationship to other statutes. See id. The Board of Representatives' appointment of Hamman in February, 2020, to fill the seat vacated by Cerasoli implicated § C1-80-2 (c) of the charter, which provides in relevant part: "When the Board of Representatives has elected a successor to fill a vacancy . . . on the Board of Education as set forth . . . in [§] C1-80-2 (b), then and in that event, *a vacancy election shall be held at the next biennial election*. . . ." (Emphasis added.) The charter does not define the word "biennial." General Statutes § 1-1 (a) directs us to construe words that are not statutorily defined according to their commonly approved usage. *State* v. *Menditto*, 315 Conn. 861, 866, 110 A.3d 410 (2015). Dictionaries in print at the time of a provision's enactment are most instructive. Id. Webster's defines "biennial" as "[h]appening, or taking place, once in two years." Webster's New International Dictionary (2d Ed. 1953) p. 265; see also Black's Law Dictionary (4th Ed. 1968) p. 206 (defining "biennially" as "once in every two years").

Because § C1-80-2 (c) does not specify whether the charter's use of the phrase "next biennial election" means even numbered or odd numbered years, we look to related charter provisions for guidance. See *Studer* v. *Studer*, 320 Conn. 483, 489, 131 A.3d 240 (2016) (related

statutory provisions often provide guidance in determining meaning of particular word). Section C1-70-1 of the charter provides in relevant part that, "[e]xcept as hereinafter provided, on the Tuesday after the first Monday in November, *1953 and biennially thereafter*, there shall be held in Stamford an election to elect officers. . . ."[5] (Emphasis added.) Because the first biennial election in Stamford was held in 1953, an odd numbered year, it is clear that successive biennial elections would also occur in odd numbered years.

Although the text of the charter itself is sufficient to establish that biennial elections in the city are held every other year in odd numbered years, this conclusion is further supported by General Statutes § 9-164 (a), which provides in relevant part: "Notwithstanding any contrary provision of law, there shall be held in each municipality, biennially, a municipal election . . . [in] the odd-numbered years . . . ." See *Fay* v. *Merrill*, 336 Conn. 432, 446, 246 A.3d 970 (2020) (§ 1-2z instructs us to consider text of statute and its relationship to other statutes). Although § 9-164 does not require municipalities to hold municipal elections biennially in odd numbered years, that is the legislature's default arrangement, and the charter contains no contrary provision but instead contains a provision that is consistent with § 9-164. Therefore, in the present case, the vacancy election for the board position would properly be held in November, 2021—not in November, 2020, as the plaintiff argues and the city originally planned.

The plaintiff is correct that, at the time of the adoption of § C1-70-1, city elections were held only biennially, in odd numbered years. In 1969, the city moved to annual elections for board positions, with three of the nine board members elected each year to staggered

[5] Section C1-80-1 of the Stamford Charter provides that members of the board are elective officers.

three year terms. See 34 Spec. Acts 74, No. 96 (1969). Therefore, the city now also holds elections in the intervening even numbered years for full-term board positions. The plaintiff argues that this fact demonstrates an intent that, as used in the charter, "biennial" means "the next town election." As our analysis makes clear, however, § C1-80-2, read together with § C1-70-1, unambiguously provides that elections for vacant positions on the board are held at the next biennial election, which is held only in odd numbered years. Because the charter is clear on this point, we do not consider circumstances surrounding the provision's enactment. See, e.g., *State* v. *Rupar*, 293 Conn. 489, 510–11, 978 A.2d 502 (2009).

Nevertheless, the plaintiff argues that the charter's savings provision, § C1-40-2,[6] when read together with § 9-220,[7] compels the opposite conclusion. Specifically, she contends that, because § 9-220 provides that the city "shall, except as otherwise provided by law, fill the vacancy [in elective office] at the next town election or at a special election called for such purpose," and because the savings provision requires the city to construe state statutes in harmony with the charter provisions, the city must fill the vacant board position at the next town election, not at the next biennial election. This argument ignores the phrase, "except as otherwise provided by law," in § 9-220. Section C1-80-2 clearly provides otherwise; that is, vacancy positions for the board are to be held at the next biennial election. There is no conflict between the charter and § 9-220.

[6] Section C1-40-2 of the Stamford Charter provides in relevant part: "Nothing contained in this Act shall be construed to repeal or terminate any statute of the State or ordinance of the City or any rule or regulation of any City Board, Commission, Department, Agency, or Authority. They shall remain in full force and effect, within the territorial limits of the City when not inconsistent with the provisions of this Charter, to be construed and operated in harmony with its provisions, until amended or repealed as herein provided. . . ."

[7] See footnote 4 of this opinion.

The plaintiff argues, however, that, even if § C1-80-2 is plain and unambiguous, its plain meaning leads to an absurd result. She makes much of the fact that board members are the only officers elected to staggered three year terms[8] and that, in the absence of a vacancy, board elections are held annually with three board positions up for election each year.[9] Because the city already holds elections for the board each year, the plaintiff argues, it is "absurd and unworkable" to limit vacancy elections to the board to biennial election years. We disagree. Vacancy elections differ from regular elections, in part because, on average, vacancies occur less frequently, and it is not always possible to predict when a vacancy will occur. A charter provision that responds to these considerations by requiring a different schedule for vacancy elections than for regular elections does not yield absurd or unworkable results.

Finally, the plaintiff argues that the city's interpretation of the charter raises first and fourteenth amendment due process issues and that the doctrine of constitutional avoidance therefore requires us to interpret "biennial election" as meaning "the next town election." Under the doctrine of constitutional avoidance, "[a] statute must be construed, if fairly possible, so as

[8] Section C1-70-3 of the Stamford Charter provides: "The terms of office of elective officers hereunder shall commence on the first day of December succeeding the election. The term of office of the Town and City Clerk shall be four (4) years; the City Constables shall be two (2) years and, commencing with the biennial election of 2013, the term of office for City Constables shall be four (4) years; the terms of office of the members of the Board of Representatives and the Mayor shall be four (4) years commencing, in accordance with Section C1-40-3 hereof, with the biennial election of 1997. The term of office of each member of the Board of Finance and of the Registrars of Voters shall be four (4) years. The term of office of each member of the Board of Education shall be three (3) years."

[9] Section C1-80-5 (a) of the Stamford Charter provides in relevant part: "Except as otherwise provided in [Section] C1-80-2 as to the filling of a vacancy, at each annual election, any political party may nominate not more than three candidates for membership on the Board of Education, to hold office for a three-year term, commencing on December first following the election. . . ."

to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401, 36 S. Ct. 658, 60 L. Ed. 1061 (1916). The United States Supreme Court has held, however, that, to apply this doctrine, "the statute must be *genuinely* susceptible to two constructions after, and not before, its complexities are unraveled." (Emphasis added.) *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). This court has similarly held that it will apply the doctrine of constitutional avoidance "[i]f literal construction of a statute raises *serious* constitutional questions . . . ." (Emphasis added.) *Sassone* v. *Lepore*, 226 Conn. 773, 785, 629 A.2d 357 (1993). As we discuss in parts II and III of this opinion, the plaintiff has not clearly articulated why the charter's plain meaning raises a risk of serious constitutional infirmity. Therefore, because we do not find the charter genuinely susceptible to two constructions, or that its plain meaning raises serious constitutional questions, we find the doctrine of constitutional avoidance inapplicable.

II

The plaintiff next claims that a charter provision limiting vacancy elections to odd numbered years violates the first amendment to the United States constitution, as applied to the states through the due process clause of the fourteenth amendment.[10] The plaintiff also claims that the city's failure to validate the votes cast in November, 2020, disenfranchises her. We address these claims in turn.

The constitutionality of a charter provision, as with statutes, presents a question of law over which our

[10] To the extent the plaintiff raises fourteenth amendment due process or equal protection claims, they are inadequately briefed and we therefore do not consider them. See *State* v. *Buhl*, 321 Conn. 688, 728–29, 138 A.3d 868 (2016).

review is plenary. A validly enacted statute or charter provision carries with it a strong presumption of constitutionality, and we will indulge every presumption in favor of its constitutionality and sustain it unless its invalidity is clear. The plaintiff thus must sustain the heavy burden of proving the statute's unconstitutionality beyond a reasonable doubt. See, e.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 405, 119 A.3d 462 (2015).

A

To the extent the plaintiff challenges the constitutionality of the charter provision on its face, she has not clearly articulated a specific constitutional claim or provided sufficient analysis or relevant authority to support her claim.[11] Insofar as the plaintiff argues that it is unconstitutional for the charter's vacancy election provision to require skipping the city's next regularly scheduled election at which a full-term board position would be on the ballot, it is well established that a municipal government has "vast leeway in the management of its internal affairs." *Sailors* v. *Board of Education*, 387 U.S. 105, 109, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1967). This leeway generally includes the ability to decide whether local officers are appointed or elected.[12] Id.,

[11] When pressed at oral argument before this court, the plaintiff's appellate counsel stated that the specific constitutional violation was "depriving citizens of a right to representation." We do not find this to be a clearly articulated constitutional claim.

[12] In *Sailors*, the court held that the board of education was a nonlegislative body and that there was no constitutional reason why board members could not be appointed rather than elected. *Sailors* v. *Board of Education*, supra, 387 U.S. 108. Although the court did not expressly consider whether the rule would also apply to legislative bodies; id., 109–10; the plaintiff does not argue that Connecticut boards of education are legislative bodies, and our case law strongly suggests that they are not. See *Stratford* v. *State Board of Mediation & Arbitration*, 239 Conn. 32, 49, 681 A.2d 281 (1996) (local board of education was not "legislative body of the municipal employer" because, "[a]lthough a local board of education has an important role in setting educational policy, its responsibilities do not customarily encompass the enactment of ordinances" (internal quotation marks omitted)).

111. Therefore, it is not surprising to find that Connecticut law provides municipalities the flexibility to decide whether members of local boards of education are elected or appointed.[13] See General Statutes § 9-185 ("*Unless otherwise provided by special act or charter* . . . members of boards of education . . . shall be elected" (emphasis added)); see also *Cheshire* v. *McKenney*, 182 Conn. 253, 259, 438 A.2d 88 (1980) (local boards of education "are either elected by local constituencies; General Statutes § 9-203; or, pursuant to the town charter, are appointed by an elected officer or body of the municipality"). New Haven is an example of a municipality that has taken advantage of this flexibility. See New Haven Charter, tit. I, art. VII, § 3 (A) (2) ("the Board of Education shall consist of seven (7) members as follows: the Mayor, four (4) members appointed by the Mayor, subject to approval by the Board of Alders; and two (2) elected by district"). Therefore, the plaintiff's argument founders at its premise: there is no right to the direct election of members of a local board of education in Connecticut at all, let alone a right to have a vacancy election conducted at the earliest possible election.

It is also well settled that, when vacant offices are in fact filled by election, the federal constitution permits some delay in the holding of vacancy elections. In *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 102 S. Ct. 2194, 72 L. Ed. 2d 628 (1982), the United States Supreme Court upheld a statute allowing the governor of Puerto Rico to appoint an interim replace-

[13] Local boards of education are creatures of the state, authorized by statute. See General Statutes § 10-218 et seq.; see also General Statutes §§ 9-203 through 9-206a. However, "the powers of local boards of education are not defined only by state statute, and . . . a local charter may limit the powers of the local board of education [when] its provisions are 'not inconsistent with or inimical to the efficient and proper operation of the educational system otherwise entrusted by state law to the local boards.' " *Cheshire* v. *McKenney*, 182 Conn. 253, 259, 438 A.2d 88 (1980).

ment to fill a vacant seat in the Puerto Rico House of Representatives until the next general election. See id., 3, 14. In *Rodriguez*, a member of the Puerto Rico legislature died in January, 1981, less than three months after his election. Id., 3. The plaintiffs in *Rodriguez* claimed that they had a federal constitutional right to a special vacancy election held before the next general election and that the interim appointment process set forth in the commonwealth's statutes violated their right of association under the first amendment. Id., 7. The court held against the plaintiffs. See id., 14.

In arriving at its decision, the court in *Rodriguez* relied on the reasoning of another vacancy election case, *Valenti* v. *Rockefeller*, 292 F. Supp. 851 (S.D.N.Y. 1968), aff'd, 393 U.S. 405, 89 S. Ct. 689, 21 L. Ed. 2d 635 (1969), and aff'd sub nom. *Phillips* v. *Rockefeller*, 393 U.S. 406, 89 S. Ct. 693, 21 L. Ed. 2d 636 (1969), and aff'd sub nom. *Backer* v. *Rockefeller*, 393 U.S. 404, 89 S. Ct. 693, 21 L. Ed. 2d 635 (1969). See *Rodriguez* v. *Popular Democratic Party*, supra, 457 U.S. 10–12. *Valenti* involved a seventeenth amendment challenge to a New York state law requiring a vacant United States Senate position to be filled not at the next election but at the next election *in an even numbered year*. *Valenti* v. *Rockefeller*, supra, 853. In *Valenti*, the court held that New York was not required to hold an election in either 1968 or 1969 for a vacancy that occurred in 1968, and that the state law requiring the vacancy election to wait until 1970 was constitutional. Id., 853–54.

In relying on the reasoning in *Valenti*, the court in *Rodriguez* explained: "[T]he fact that the [s]eventeenth [a]mendment permits a [s]tate, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate suggests that a state is not constitutionally prohibited from exercising similar latitude with regard to vacancies in its own legislature. We discern nothing in the [f]ederal [c]onstitution that

imposes greater constraints on the [c]ommonwealth of Puerto Rico.

"The [c]ommonwealth's choice to fill legislative vacancies by appointment rather than by a full-scale special election may have some effect on the right of its citizens to elect the members of the Puerto Rico [l]egislature; however, the effect is minimal, and like that in *Valenti*, it does not fall disproportionately on any discrete group of voters, candidates, or political parties. . . . Moreover, the interim appointment system plainly serves the legitimate purpose of ensuring that vacancies are filled promptly, without the necessity of the expense and inconvenience of a special election. The [c]onstitution does not preclude this practical and widely accepted means of addressing an infrequent problem." (Citation omitted.) *Rodriguez* v. *Popular Democratic Party*, supra, 457 U.S. 11–12.

Here, the plaintiff appears to argue that the first amendment requires the city to hold an election for a vacant board position at the next regularly scheduled city election, in this case the November, 2020 election during which three full-term board positions were also on the ballot. It is true that the charter provision in this case differs from the statute at issue in *Rodriguez* because, in *Rodriguez*, no regularly scheduled election passed before the vacancy was filled. See generally id. Rather, the court in *Rodriguez* held that no *special* election was constitutionally required. Id., 12. In *Valenti*, however, the statute that was upheld required voters to wait through *two* more regularly scheduled elections before casting a vote to fill the vacancy. *Valenti* v. *Rockefeller*, supra, 292 F. Supp. 855. Although it is true that *Valenti* involved the seventeenth amendment, which is not at issue in this case, considered together, *Rodriguez* and *Valenti* (neither of which the plaintiff has considered in her brief) strongly suggest that it does not violate the federal constitution to delay the

holding of a vacancy election until the "next biennial election." The plaintiff has presented us with no authority, and this court is aware of none, holding such a provision to be unconstitutional in the thirty-nine years since *Rodriguez*.[14]

B

To the extent the plaintiff claims that the federal constitution entitles her to have the votes counted and the void election validated, we disagree. The plaintiff claims that, even if the charter itself is not constitutionally infirm, the constitution requires that the votes in the election that the city declared void must be counted and the outcome honored because (1) the city having placed the position on the ballot, votes were actually cast for that position, and (2) there was an established past practice of holding vacancy elections in even numbered years.

As discussed in part I of this opinion, the plain language of the charter means that no valid vacancy election for the board position at issue could have been held in November, 2020. "[T]he right or power to hold an election must be based on authority conferred by law, and an election held without affirmative constitu-

[14] Because we conclude that the plaintiff has not advanced a serious challenge to the constitutionality of the charter provision by providing authority in support of her claim that the constitution demands that the city fill the vacancy at the next election, we also decline to analyze the provision under either the strict scrutiny standard of review or the *Anderson-Burdick* balancing test, which demands an analysis of competing interests that the plaintiff fails to provide. See *Burdick* v. *Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992); *Anderson* v. *Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983); see *Burdick* v. *Takushi*, supra, 434 ("[a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the [f]irst and [f]ourteenth [a]mendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights' ").

tional or statutory authority, or contrary to a material provision of the law, is a nullity, even though it is fairly and honestly conducted." 29 C.J.S. 135–36, Elections § 127 (2005). "A court lacks jurisdiction to authorize or compel the holding of a void election." Id., p. 136.

It is unfortunate that votes were cast for the position that appeared on the ballot in error, but this fact does not mean that an election for the board vacancy position appropriately took place. Similarly, the fact that the votes cast were initially reported in the secretary's election management system does not mean that an election for the position took place.[15] The plaintiff has not presented us with any authority, and we are aware of none, suggesting that constitutional principles require us to validate a void election.

The plaintiff argues that, to avoid unconstitutionally disenfranchising her, the votes cast should be counted and the outcome of the "election" honored. She cites several cases in support of this position: *Roe* v. *Alabama*, 68 F.3d 404 (11th Cir. 1995), *Griffin* v. *Burns*, 570 F.2d 1065 (1st Cir. 1978), *Briscoe* v. *Kusper*, 435 F.2d 1046 (7th Cir. 1970), *Hoblock* v. *Albany County Board of Elections*, 487 F. Supp. 2d 90 (N.D.N.Y. 2006), and *Williams* v. *Sclafani*, 444 F. Supp. 906 (S.D.N.Y.), aff'd sub nom. *Williams* v. *Velez*, 580 F.2d 1046 (2d Cir. 1978). Each of those cases indeed involved rulings by

[15] Although we ultimately agree with the defendants in the present case that an election should not have been held and that the race should not have appeared on any ballots, until the trial court and, ultimately, this court ruled on the matter, this outcome was not clear. When the validity of an election is unclear, the wisest course would be for the head moderator to include the disputed votes for the vacant position in his final report to the secretary of the state. Although reporting votes cast in a void election might not be required by statute, at the time the votes were reported, there was no legally conclusive decision that the election was void. That determination is made today, when this opinion is officially released. As a result, the votes should be recorded for historical purposes and to assist courts in the event of a challenge to the validity of the election or any ruling of an election official.

election officials that resulted in the rejection of ballots cast. The difference, however, is that each of those cases involved a valid election or primary election.[16] Here, by contrast, the election itself was void. We agree with the trial court that, when "the charter specifies the method for filling vacancies, that method cannot be changed by a mistake of an election official. If the charter does not authorize an election, then an election cannot be held."

In fact, it would disenfranchise the city's voters, who adopted the charter, to *count* the ballots cast in the void election and disregard the provisions of the charter directing that vacancies must be filled at a biennial election held in odd numbered years. "[T]he electors have not been deprived of their opportunity to participate in the democratic process with respect to the procedure for filling a vacancy because, [a]s the source of a municipality's powers, charters are generally adopted and amended at a referendum by the municipality's electors." (Internal quotation marks omitted.) *Cook-Littman* v. *Board of Selectmen*, supra, 328 Conn. 779. Validating a void election would also disenfranchise the many voters who opted not to cast any vote in the election in reliance on the city's announcement of its

[16] For example, in *Hoblock*, the issue was the rejection of absentee ballots that were cast but subsequently rejected in a valid election. *Hoblock* v. *Albany County Board of Elections*, supra, 487 F. Supp. 2d 97–98. The absentee ballots issued to voters were invalid; id., 95; but the underlying election was valid. Id., 98. In *Griffin*, the issue was the rejection of all absentee ballots cast in a valid primary election. *Griffin* v. *Burns*, supra, 570 F.2d 1074. *Roe* v. *Alabama*, supra, 68 F.3d 405, also involved contested absentee ballots in an otherwise valid election. In *Briscoe*, the issue was the invalidation of nominating petitions, signed in a previously acceptable way, after election officials had adopted new regulations without prior publication or an opportunity for candidates to respond when an election official invalidated any signature. *Briscoe* v. *Kusper*, supra, 435 F.2d 1054–55. Similarly, *Williams* v. *Sclafani*, supra, 444 F. Supp. 909, involved the validation of designating petitions required for placement on a primary ballot.

correct conclusion that the position had been placed on the ballot in error.[17]

This analysis is consistent with our recent decision in *Cook-Littman*, in which the trial court, construing the charter of the town of Fairfield, ordered the town to conduct a special election to fill a vacant seat on the Board of Selectmen that already had been filled by appointment. Id., 762, 764–65. This court reversed the trial court's judgment, holding that the special election was invalid and that the trial court could not substitute its own ideas for a clear expression of legislative will. See id., 779. By the time the case had come before this court, the special election the trial court had ordered already had been held, and the winner of that election had replaced the person appointed to fill the vacancy. Id., 765–66. Because the election was never valid, however, this court held that the appointee was entitled to reinstatement. Id., 779. Although no constitutional claims were raised in *Cook-Littman*, that case makes clear that following the express terms of a charter adopted by the voters does not result in disenfranchisement.

The parties' stipulation that a board vacancy election was held in Stamford in 2016 does not change our analysis. The plaintiff contends that this creates an "established past practice" and appears to argue that, if a city violated its charter in the past, it must continue to do so going forward. But a void election is a void election, regardless of whether it is the result of a onetime mistake by an election official or a similar past mistake. The confusion the city's error caused is regrettable. But neither the fact that the city held another vacancy election in 2016 nor the fact that some voters cast absen-

[17] The candidates for the full-term board positions properly on the ballot received more than 22,000 votes each. The plaintiff, who received the highest number of votes for the vacant position that appeared on the ballot, received 578 votes.

tee ballots in the 2020 election changes the fact that there was no valid election for the board vacancy position, and, thus, no voters were disenfranchised by the city's failure to count and certify the votes cast.

III

The plaintiff next claims that, even if the charter provision does not violate the federal constitution, it conflicts with the greater protections afforded by the Connecticut constitution. The defendants contend that the charter provision has a legitimate governmental purpose—to have a single process for filling vacancies, regardless of the office—and that there is no state constitutional principle that provides that vacancies must be filled by election as soon as possible. We conclude that the plaintiff has not demonstrated that the Connecticut constitution affords greater protections under the facts of this case.

As in part II of this opinion, our review of whether a charter provision violates the state constitution is plenary. See, e.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, supra, 317 Conn. 405. In *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992), "we identified six nonexclusive tools of analysis to be considered, to the extent applicable, whenever we are called on as a matter of first impression to define the scope and parameters of the state constitution: (1) persuasive relevant federal precedents; (2) historical insights into the intent of our constitutional forebears; (3) the operative constitutional text; (4) related Connecticut precedents; (5) persuasive precedents of other states; and (6) . . . relevant public policies." (Internal quotation marks omitted.) *State* v. *McCleese*, 333 Conn. 378, 387, 215 A.3d 1154 (2019). "It is not critical to a proper *Geisler* analysis that we discuss the various factors in any particular order or even that we address each factor." Id., 388.

As for the *Geisler* factors concerning constitutional text, federal and Connecticut precedents and public policy, the plaintiff has primarily recited unhelpful truisms—that the state constitution in some contexts provides Connecticut citizens greater protection than the federal constitution. The plaintiff does not engage in any real analysis suggesting that the constitutional text, Connecticut precedent, or federal precedent supports an enhanced state constitutional right. As discussed in part II of this opinion, we conclude that federal precedent does not support the plaintiff's claim. The plaintiff does not address our state constitutional history at all, except to say that "the intent of our constitutional forebears to protect these fundamental, foundational rights is made clear by the sheer number of overlapping applicable rights set forth in the Connecticut constitution."

With respect to authority from other jurisdictions, the plaintiff cites numerous out-of-state cases in support of her argument that the state constitution requires vacancy positions to be filled by election—as opposed to by appointment—as soon as possible. We do not find any of these cases to be persuasive. Most come from states with constitutional provisions that expressly address vacancy elections and require that vacancies be filled in a particular way or within a particular time frame. See *Bolin* v. *Superior Court*, 85 Ariz. 131, 137–38, 333 P.2d 295 (1958); *State* v. *Highfield*, 34 Del. 272, 283–84, 152 A. 45 (1930); *Roher* v. *Dinkins*, 32 N.Y.2d 180, 184–86, 298 N.E.2d 37, 344 N.Y.S.2d 841 (1973); *Rodwell* v. *Rowland*, 137 N.C. 617, 618, 50 S.E. 319 (1905); *State ex rel. Whitney* v. *Johns*, 3 Or. 533, 534–35 (1869); *Commonwealth* v. *Maxwell*, 27 Pa. 444, 449 (1856).[18] Our constitution contains no such provision

[18] In *State ex rel. Toledo* v. *Lucas County Board of Elections*, 95 Ohio St. 3d 73, 76–78, 765 N.E.2d 854 (2002), the court followed the applicable provisions of the city charter of Toledo, Ohio, holding that those provisions were not in conflict with the Ohio constitution.

pertaining to the vacancy at issue in this case. And in *State ex rel. Harsha* v. *Troxel*, 125 Ohio St. 235, 237–38, 181 N.E. 16 (1932), another case on which the plaintiff relies, the applicable statute contained *no* mechanism for filling a vacancy by appointment, which meant that the position would remain completely unfilled in the absence of a vacancy election.

The plaintiff advances no authority, and we are aware of none, indicating that any of the *Geisler* factors support her claim that the state constitution provides greater protection than the federal constitution under the facts of this case.

IV

Finally, the plaintiff claims that the doctrine of municipal estoppel requires the defendants to count the votes cast because the vacant position appeared on the ballot for the November, 2020 election. Specifically, she argues that she detrimentally relied on the position's appearance on the ballot by filing the proper forms to register as a write-in candidate and undertaking the effort to run a race for the vacant position. We disagree that municipal estoppel can be used to validate a void election.

"[F]or a court to invoke municipal estoppel, the aggrieved party must establish that: (1) an authorized agent of the municipality had done or said something calculated or intended to induce the party to believe that certain facts existed and to act on that belief; (2) the party had exercised due diligence to ascertain the truth and not only lacked knowledge of the true state of things, but also had no convenient means of acquiring that knowledge; (3) the party had changed its position in reliance on those facts; and (4) the party would be subjected to a substantial loss if the municipality were permitted to negate the acts of its agents." (Internal quotation marks omitted.) *Levine* v. *Sterling*, 300 Conn.

521, 535, 16 A.3d 664 (2011). The party claiming estoppel has the burden of proof. Id. "Whether that burden has been met is a question of fact that will not be overturned unless it is clearly erroneous." (Internal quotation marks omitted.) Id.

The trial court did not address the plaintiff's municipal estoppel claim in its memorandum of decision, although both parties briefed the issue before the trial court. Because the issue of whether the plaintiff has met her burden is a question of fact and the trial court did not make such a finding, under ordinary circumstances, we might consider whether a remand to or an articulation by the trial court would be required. See Practice Book § 61-10 (b); *Russo* v. *Waterbury*, supra, 304 Conn. 737. However, "[t]here are times . . . when the undisputed facts or uncontroverted evidence and testimony in the record make a factual conclusion inevitable so that a remand to the trial court for a determination would be unnecessary." (Internal quotation marks omitted.) *Russo* v. *Waterbury*, supra, 737. In the present case, a remand would be pointless because the trial court could reach only one conclusion—that the estoppel claim fails. First, as previously discussed, under the present circumstances, there was no valid election. The plaintiff cannot show that she would be subjected to a substantial loss in this case because, under the charter, there was no election in which she could run. Therefore, there was no seat to lose. In addition, the plaintiff cannot show that she "lacked knowledge of the true state of things" or had "no convenient means of acquiring that knowledge . . . ." (Internal quotation marks omitted.) *Levine* v. *Sterling*, supra, 300 Conn. 535. Although it is true that eleven days passed between the time when the plaintiff registered as a write-in candidate and when she met with city officials to discuss the error, had the plaintiff exercised due diligence by reading the charter or asking the city for clarification before

registering as a write-in candidate, she could have avoided any harm resulting from her misapprehension of the charter. The intervenor in this case, who appears to have been the first to discover and report on the ballot error in an October 9, 2020 blog post, did exactly that. Finally, the plaintiff also had actual knowledge of the true state of affairs no later than October 16, 2020, when Mayor Martin and Attorney Emmett met with the plaintiff after discovering that the position had been placed on the ballot in error. Because the plaintiff has failed to sustain her burden of establishing a necessary element of municipal estoppel, we reject this claim.

The judgment is affirmed.

In this opinion the other justices concurred.

JAMES G. GALLAGHER *v.* TOWN OF FAIRFIELD ET AL.
(SC 20533)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

Syllabus

The plaintiff sought damages from the defendant town for, inter alia, breach of contract. The plaintiff worked as a police officer for the town and retired on disability in 1986 after sustaining an injury in the course of his employment. In 1985, the town had entered into a collective bargaining agreement with a union in which the plaintiff was member. At that time, federal law did not permit municipal employees to enroll in Medicare, but the law was amended thereafter to permit or require municipal employees to participate in Medicare. The 1985 collective bargaining agreement provided that union members who retired due to disability would be entitled to town paid private health insurance. In 2016, the year after the plaintiff reached the age of sixty-five, the town informed him that he would be required to enroll in Medicare and to pay the cost of his Medicare Part B premiums. The plaintiff claimed that the town was bound to provide him with town paid private health insurance under the collective bargaining agreement or, alternatively, that it was obligated to subsidize the costs of his Medicare Part B premiums. Following a trial, the court concluded that the collective bargaining agreement

did not bar the town from requiring that the plaintiff transition to Medicare, so long as the Medicare plan did not substantially reduce the benefits provided. The court also concluded, however, that the town was bound to subsidize the costs of his Medicare Part B premiums. Thereafter, the town appealed and the plaintiff cross appealed from the trial court's judgment. *Held*:

1. The trial court correctly concluded that the collective bargaining agreement did not preclude the town from terminating the private health insurance in which the plaintiff was enrolled and requiring him to transition to Medicare coverage: the collective bargaining agreement did not specifically require that the plaintiff be placed, and that he remain, on the same health insurance plan as the town's "active employees," as that term did not appear in the agreement, and the agreement did not address what rights retirees would have following the expiration of that agreement in 1987; moreover, the agreement did not specify whether Medicare qualifies as an insurance carrier or whether retirees who become eligible for Medicare can be treated differently from active employees, and, although a 2010 collective bargaining agreement between the town and the union required eligible union retirees to participate in Medicare, that did not necessarily mean that the silence in the 1985 collective bargaining agreement with respect to that issue was purposeful, as federal Medicare law changed after the 1985 collective bargaining agreement went into effect, and testimony at trial suggested that, when the town agreed, in 1985, to subsidize retirees' health insurance costs for life, it was with the expectation that the retirees would not be eligible to enroll in Medicare and that private insurance would be their only available coverage option; furthermore, the town's course of performance in allowing the plaintiff to remain enrolled in private health insurance since his retirement in 1986 did not demonstrate that the plaintiff was entitled to continue on that path, as he was not eligible to enroll in Medicare until he turned sixty-five, the only reason why the town did not immediately terminate the plaintiff's private insurance coverage when he did turn sixty-five was that there was confusion over whether that transition needed to be delayed pending the resolution of a workers' compensation claim, and other union members who retired along with the plaintiff under the 1985 collective bargaining agreement also had been transitioned to Medicare.

2. This court declined to address the plaintiff's claim that the town illegally transferred him from private health insurance to Medicare without his consent, as the record was inadequate for review of that claim and the claim was inadequately briefed.

3. The trial court incorrectly concluded that the town was required to reimburse the plaintiff for the cost of his Medicare premiums; the plaintiff conceded that the town was required to provide him only with benefits that are afforded to active employees, rather than benefits comparable to those that he received under the 1985 collective bargaining agreement,

the 2010 collective bargaining agreement required that active employees share the costs of their private health insurance, active employees were required to contribute toward the town's premium equivalent costs, and the evidence adduced by the plaintiff suggested that he was paying no more for his health insurance than the town's active employees.

Argued January 14—officially released July 28, 2021*

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Radcliffe, J.*; judgment in part for the plaintiff, from which the defendants appealed and the plaintiff cross appealed. *Reversed in part*; *judgment directed.*

Catherine L. Creager, with whom was *James T. Baldwin*, for the appellants-cross appellees (defendants).

William J. Ward, for the appellee-cross appellant (plaintiff).

Opinion

KAHN, J. This case requires that we construe a collective bargaining agreement between the named defendant, the town of Fairfield, and its police union. The agreement took effect in 1985, at a time when federal law did not permit municipal employees to participate in the Medicare system. The agreement provides that union members who retired early due to disability, such as the plaintiff, James G. Gallagher, as well as their eligible dependents, would be entitled to town paid private health insurance. The question presented is whether, following an intervening change in federal law that permits the plaintiff and other similarly situated retirees to enroll in Medicare upon reaching the age of sixty-five, the town may terminate their private health insurance, provide them with comparable town paid Medicare sup-

* July 28, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

plemental insurance, and require that they bear the costs of their Medicare premiums. The defendants have appealed, and the plaintiff has cross appealed, from the judgment of the trial court, which concluded that the town may require the plaintiff and his wife to enroll in Medicare but, in addition to paying for their Medicare supplemental insurance and any uncovered medical expenses, must also reimburse the costs of their Medicare Part B premiums. We agree with the former conclusion but hold that the town is not required to reimburse the Gallaghers for their Medicare premium costs. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

I

The following facts, which were either found by the trial court or are undisputed, and procedural history are relevant to our disposition of the parties' claims. The plaintiff began working as a police officer for the town in 1974. In October, 1986, after twelve years of service, and after the plaintiff had sustained a serious injury in the course of his employment, he successfully petitioned the defendant Police and Fire Retirement Board of the Town of Fairfield to retire on disability. The plaintiff was thirty-five years old at that time.

At all relevant times, the plaintiff was a member of the Fairfield Police Union International Brotherhood of Police Officers, Local 530 (union), which is not a party to the present action. The union and the town entered into a three year collective bargaining agreement in 1985 (1985 CBA) that was in effect at the time of the plaintiff's retirement. Pursuant to that agreement, the relevant terms of which are set forth in part II of this opinion, the town was required to provide and subsidize the cost of private health insurance coverage for disability retirees, such as the plaintiff, and their eligible dependents.

On March 24, 2016, upon reaching the age of sixty-five, the plaintiff became eligible to receive Medicare benefits. Around that time, the town's risk manager, Eileen Kennelly, informed the plaintiff that the town would continue to subsidize his private health insurance costs and those of his since deceased wife, Joy Gallagher, and that they would not be required to enroll in Medicare. The following year, however, Emmet P. Hibson, Jr., the town's human resources director and an employee of the defendant Town of Fairfield Personnel Department, notified the plaintiff that, effective July 1, 2017, he and his wife would be required to enroll in Medicare and to each pay the $134 monthly cost[1] of their Medicare Part B premiums. Hibson indicated that the town would transfer the Gallaghers to a private Medicare supplemental insurance plan and cover the costs of that plan. The town agrees that it is required to reimburse any medical costs not covered by Medicare, beyond a $100 annual deductible. Under the town's view of the agreement, then, the plaintiff was responsible for paying his own Medicare premiums, and it was responsible for paying the costs of his Medicare supplemental insurance, as well as any uncovered medical costs.

The plaintiff filed the present action in 2017. He alleged that the town was bound to continue to provide the Gallaghers with town paid private health insurance, both by the terms of the 1985 CBA and by the defendants' prior representations to him and through their course of performance, and, in the alternative, that the town was obligated to subsidize the costs of their Medicare Part B premiums.

[1] The trial court's statement that the Gallaghers' combined Medicare Part B premium costs totaled $536 per month appears to be a scrivener's error derived from adding the plaintiff's $134 *monthly* fee with his wife's $402 *quarterly* fee, which is also $134 per month. There is no evidence in the record that would support the $536 figure, and the plaintiff acknowledges that the $134 per person figure is correct.

Following a bench trial, the trial court concluded that the 1985 CBA does not bar the town from requiring that the Gallaghers transition from private health insurance to Medicare. The court also concluded that the doctrine of municipal estoppel did not apply because it determined that the Gallaghers did not rely to their detriment on the defendants' earlier representations that they would be permitted to remain enrolled in private insurance. The trial court also concluded, however, that the town was contractually bound to subsidize the costs of the Gallaghers' Medicare Part B premiums. The court rendered judgment accordingly, awarding $10,184 to reimburse the Gallaghers for the costs of their Medicare premiums paid through March 1, 2019, and ordering the town to reimburse them for the costs of premiums incurred after that date.

The defendants appealed and the plaintiff cross appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal and cross appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Additional facts will be set forth as relevant.

II

The plaintiff's primary argument on appeal is that the town was contractually obligated to continue to provide the Gallaghers with town paid private health insurance throughout their lifetime and, therefore, that the trial court incorrectly concluded that the town was permitted to terminate the Gallaghers' private health insurance and require that they, instead, enroll in Medicare.[2] The plaintiff also contends that the defendants illegally

[2] We note that the town could not, of course, legally require that the Gallaghers enroll in Medicare. We use such language in this opinion simply as a shorthand for the concept that, by terminating the Gallaghers' private health insurance but agreeing to provide supplemental Medicare coverage, the town effectively required that they enroll in Medicare in order to continue to receive subsidized insurance.

transferred the Gallaghers from private health insurance to Medicare without their signatures or consent.[3] We consider each claim in turn.

A

"Principles of contract law guide our interpretation of collective bargaining agreements. . . . When, as in the present case, the trial court based its interpretation solely on the language of the contract, our standard of review is plenary." (Citation omitted; internal quotation marks omitted.) *Russo* v. *Waterbury*, 304 Conn. 710, 720, 41 A.3d 1033 (2012).

The following additional facts are relevant to the plaintiff's central claim that the town was contractually bound to maintain the Gallaghers' private health insurance. The relevant portions of the 1985 CBA[4] provide:

"ARTICLE IX—INSURANCE

"Section 1. The town shall provide and pay for the following insurance for each employee and his enrolled dependents:

"a. The Connecticut Hospital Service (Blue Cross) semi-private room credit rider and out-patient benefits credit rider plan.

"b. The town will provide and pay the cost of a major medical policy which shall contain a one hundred dollar ($100.00) deductible ($200.00 family maximum) and 80/

[3] Because we conclude that the town did not act illegally in transferring the Gallaghers to Medicare and was not obligated to reimburse the costs of the Gallaghers' Medicare premiums, and in light of the defendants' representations that the town will reimburse the plaintiff for any costs that are not covered by Medicare or supplemental insurance, we need not address the plaintiff's additional claim on appeal that the trial court should have awarded him other out-of-pocket costs associated with the transition to Medicare.

[4] For ease of review, throughout this opinion, we have modified the capitalization of the relevant contractual language in conformance with the style of this court, without noting those changes in brackets.

20 [percent] co-insurance to $2,000.00 of covered charges per member per calendar year and 100 [percent] thereafter to the policy maximum of one million dollars ($1,000,000.00).

"c. In the event the town changes insurance carriers, i.e., Blue Cross/Blue Shield, the town agrees the present coverages and benefits shall remain in effect without any additional qualifications. For example, no employee, covered under the collective bargaining agreement, shall suffer any loss or reduction in coverages and benefits because of such change. Sixty (60) days prior to the implementation of any change in carrier, the town shall submit to the union the new coverage so that the union can ascertain that in fact the coverage is as set forth above.

* * *

"Section 7.—Insurance for Retirees. Effective 7-1-84, employees with at least twenty-five years of service who retire under the normal retirement provisions of the police and firemen's retirement plan and their enrolled dependents shall be entitled to town paid health insurance coverage. Employees who retire under the disability provisions of the retirement plan and their enrolled dependents shall also be entitled to town paid health insurance coverage. The benefits to be provided are listed in article IX Insurance, [§] 1 a, b, c . . . . Employees who retire with at least twenty-five (25) years of service but who are less than fifty-one (51) at the time of retirement, other than retirees under the disability provisions of the retirement plan, shall, upon attaining the age of fifty-one (51) be entitled to the benefits listed in article IX, [§] 1a., b., c. . . . in effect at the time of their retirement. . . ."

The plaintiff also entered into evidence a copy of the collective bargaining agreement between the town and the successor to the union that was in effect between 2010 and 2013 (2010 CBA). Article IX, § 9.03, of the 2010

CBA provides in relevant part: "Except as otherwise provided for below, employees entitled to the retiree medical insurance benefits under this section shall continue to receive in retirement the same medical insurance benefits they received as an active employee, with the understanding that if the active employees switch to a new plan which is substantially equivalent to or better than the plan the employee retired under, the retiree will be switched to the new plan. . . . Such coverage shall change to the Medicare carve out plan at age 65, in accordance with current practice. . . .

"Employees eligible for Social Security Medicare benefits shall be required to participate in the Medicare Part A and B plans upon attaining eligibility. [The coverages afforded to employees retiring in accordance with the disability provisions of the police and fire retirement plan and their eligible enrolled dependents] shall be reduced to a Medicare carve-out for those covered upon reaching the age of 65. The cost of Medicare, if any, shall be borne by the retiree. . . ."

The trial court concluded that the 1985 CBA permits the town to transfer disability retirees from a private health insurance plan to a supplemental Medicare plan, effectively forcing them to enroll in Medicare in order to maintain coverage, so long as the Medicare plan does not substantially reduce the benefits provided. The court further concluded that the benefits provided by Medicare, in tandem with the town's Medicare supplemental insurance plan, were at least as favorable as those afforded by the private insurance plan under which the plaintiff retired, especially in light of the fact that the town has agreed to reimburse any medical expenses not covered by Medicare.[5]

[5] For the same reasons, the trial court concluded that the town was in compliance with General Statutes § 7-459c, which, among other things, prohibits any municipality that provides retiree group health insurance benefits from diminishing or eliminating such benefits in violation of any collective bargaining agreement.

The plaintiff contends that the trial court misconstrued the 1985 CBA because, he alleges, that agreement "specifically requires the [town] to provide the same health insurance to the plaintiff and his wife as it provides to its active employees," and the town continues to provide its active union employees with private medical insurance. We are not persuaded.

As an initial matter, we note that the plaintiff is simply incorrect when he contends that the 1985 CBA *specifically* requires that he be placed, and that he remain, on the same health insurance plan as the town's active employees. The term "active employees" does not appear anywhere in the 1985 CBA, and that agreement does not, by its terms, address what rights, if any, retirees such as the plaintiff will have following the expiration of the agreement in 1987. Although it is reasonable to assume that the parties intended that employees who retired during the three years when the 1985 CBA was in effect would continue to receive the retirement benefits enumerated in article IX after the agreement expired in 1987, whether those benefits were to remain static, be pegged to those due to future active employees under future collective bargaining agreements, or be defined in some other manner is never *expressly* set forth in the agreement. Moreover, the 1985 CBA leaves it to the union to approve whether any change in town provided health insurance is acceptable. Nothing in the agreement, then, specifically bars the town from transferring the Gallaghers from private insurance to Medicare.

The plaintiff offers three additional arguments as to why the 1985 CBA bars the town from transferring him to Medicare. First, the plaintiff notes that article IX, § 7, of the 1985 CBA provides that employees on disability retirement are entitled to the benefits "listed in article IX Insurance, [§] 1 a, b, c, [§] 2, [§] 3, [§] 5 and [§] 6." He further notes that article IX, § 1 (a), commits the town to providing and paying for a Blue Cross insurance

plan for each employee, and that article IX, § 1 (c), indicates that, "[i]n the event the town changes insurance carriers, i.e., Blue Cross/Blue Shield, the town agrees the present coverages and benefits shall remain in effect without any additional qualifications." The plaintiff reads this language to mean that, at least as long as active employees are entitled to private health insurance, he must be as well.

We disagree that the plain language of the 1985 CBA unequivocally bars the town from transferring eligible disability retirees to Medicare. Article IX, § 1 (a), provides for one specific insurance plan that was available at the time, the "Connecticut Hospital Service (Blue Cross) semi-private room credit rider and out-patient benefits credit rider plan." The parties agree that the town is not bound to continue to provide that plan, which no longer exists but, instead, may offer other plans affording comparable benefits. Article IX, § 1 (c), sets forth the rules that apply in the event that the town changes private insurance carriers, such as moving from Blue Cross to a different carrier. The contract is simply silent as to whether (1) Medicare qualifies as an insurance carrier for purposes of article IX, § 1 (c), and (2) retirees who become eligible for Medicare can be treated differently from active employees, none of whom, presumably, is Medicare eligible. Cf. *Agor* v. *Board of Education*, 115 App. Div. 3d 1047, 1048–49, 981 N.Y.S.2d 485 (2014) (collective bargaining agreement that provided retirees no cost health insurance without express reference to Medicare was deemed ambiguous with respect to Medicare reimbursement requirement). Accordingly, we are not persuaded by the plaintiff's argument that the plain language of the 1985 CBA bars the town from transitioning eligible retirees to Medicare.

Second, the plaintiff relies on the principle that, when parties include a provision in one writing and omit

that provision from another comparable writing, that omission may be deemed to be purposeful. See, e.g., *Gibbs International, Inc.* v. *ACE American Ins. Co.*, Docket No. 7:15-cv-4568 (BHH), 2018 WL 1566730, *11 (D.S.C. March 30, 2018). He emphasizes the fact that the 2010 CBA expressly requires union employees who retired pursuant to the terms of that agreement to participate in Medicare upon attaining eligibility, in lieu of the town's private health insurance plans. The plaintiff contends that the fact that the town and the union agreed to include a Medicare requirement in the 2010 CBA but not in the 1985 CBA must have been a purposeful and deliberate indication that there was no intention that retirees under the earlier CBA could be made to enroll in Medicare. This argument, ultimately, is unpersuasive.

The fact that parties do not speak to an issue in one contract but proceed to address it in a subsequent contract does not necessarily mean that their initial silence was purposeful. When subsequent agreements between the parties address and resolve a previously unaddressed issue, the alteration may mean nothing more than that the parties have addressed a gap in the initial contract, reaching agreement on an issue that they had not previously considered or anticipated. See, e.g., *Agor* v. *Board of Education*, supra, 115 App. Div. 3d 1048–49 (when initial collective bargaining agreement was silent as to Medicare and subsequent agreements expressly provided that retirees would be entitled to Medicare Part B reimbursements, court deemed it "equally plausible" that such language was included in subsequent agreements to clarify intent, rather than to change meaning, of initial agreement).

In this case, the plaintiff's argument fails to account for the fact that federal Medicare law changed after the 1985 CBA went into effect. Prior to April, 1986, state and municipal employees generally were not eligible to

participate in the Medicare program. See Senate Finance Committee, Report, Financing Comprehensive Health Care Reform: Proposed Health System Savings and Revenue Options (May 20, 2009), reprinted in [2009-2 Transfer Binder: Current Developments] Medicare & Medicaid Guide (CCH) ¶ 52,862, pp. 112,582–83. They did not pay Medicare taxes (nor did their employers pay such taxes on their behalf), and they were not eligible to collect Medicare benefits upon retirement. Congress amended the Medicare laws in 1986, while the 1985 CBA was in effect. See Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1986). The Medicare and Medicaid Budget Reconciliation Amendments of 1985, contained in the omnibus act, provided that state and municipal employees hired after March 31, 1986, were required to participate in the Medicare system. See id., § 13205, 100 Stat. 313–14, codified as amended at 26 U.S.C. § 3121 (u) (2018). As with other employees, they (and their employers on their behalf) were required to contribute 1.45 percent of their income in Medicare taxes, and they became eligible to enroll in Medicare at the age of sixty-five, assuming that they had paid into the system for a sufficient number of quarters. See 26 U.S.C. § 3101 (b) (2018); 26 U.S.C. § 3111 (b) (2018); see also State of Connecticut, Payroll Manual (Rev. 1995) § 3 (Social Security/Medicare Exemptions), available at https://www.osc.ct.gov/manuals/payroll/section3.htm (last visited July 27, 2021). Accordingly, it seems very likely that the town and the union omitted any mention of Medicare in the 1985 CBA not out of a conscious agreement that union members could not be *forced* to enroll in Medicare upon reaching the age of sixty-five but, rather, in light of the fact that the town's employees were not yet *permitted* to do so under federal law. There was testimony at trial suggesting that, when the town agreed to subsidize retirees' health insurance costs for life, it was with the expectation

that private insurance would be their only available coverage option.[6] Federal law was amended soon thereafter to permit or require municipal employees to participate in Medicare, and subsequent labor agreements between the town and the police union reflect that fact.

This intervening change in federal law illuminates the flaw in the plaintiff's interpretation of the parties' omission of any reference to Medicare in the 1985 CBA. It seems clear that the omission reflected the fact that the parties could not then have anticipated that Congress would amend federal law to allow members of the police union to enroll in Medicare. There was undisputed testimony at trial that the language requiring eligible retirees to enroll in Medicare was first included in a collective bargaining agreement between the town and the union in 1989 or 1990, following the enactment of the new federal Medicare provisions. Viewing the matter in this light, we are persuaded that the Medicare provisions in subsequent agreements indicate how the union and the town would have addressed the question of Medicare eligibility in 1985, had they been aware of the impending change in federal law at that time. It certainly stands to reason that, once union members (and the town on their behalf) began paying into the Medicare system, the town could expect that those employees would begin to collect their (largely) federally funded benefits as they became eligible, rather than continue to have the town subsidize the costs of private insurance.

[6] Although the record is silent on the question, we can assume that the plaintiff (and the town, on his behalf) began paying Medicare taxes after the Medicare and Medicaid Budget Reconciliation Amendments of 1985 went into effect. Under that law, states were given the option as to whether to provide Medicare coverage for state and municipal employees, such as the plaintiff, who were hired prior to April 1, 1986. See 42 U.S.C. § 418 (2018); Senate Finance Committee, supra, Medicare & Medicaid Guide (CCH), ¶ 52,862, pp. 112,582–83. If the plaintiff had not paid into the system for at least forty quarters, he would not now be eligible to receive Medicare benefits. See 42 U.S.C. 414 (2018).

The plaintiff's third and final argument is that the defendants have, by their course of performance, demonstrated that he is entitled to remain enrolled in private health insurance. He notes that he has been allowed to remain enrolled in the same plan as the town's active employees since his retirement, both before and after he reached the age of sixty-five.

We begin by noting that the fact that the town allowed the plaintiff to remain enrolled in private insurance *before* he turned sixty-five does not bear on the question presented, because he was not Medicare eligible prior to that time. It is only the parties' conduct since the plaintiff and other, similarly situated retirees turned sixty-five and became Medicare eligible that is relevant to the question of whether the town is allowed to transition them from private insurance to Medicare.

The record reveals that the delay in the transition of the plaintiff from private insurance to Medicare was not the result of the town's believing that he was entitled to remain enrolled in private insurance. There was testimony, on which the trial court reasonably could have relied, that the only reason why the town did not immediately terminate the plaintiff's private insurance coverage when he turned sixty-five was some legal confusion over whether that transition needed to be delayed pending the resolution of a workers' compensation claim. It is undisputed that all of the town's unionized Medicare eligible retirees are enrolled in Medicare. Most important, there was undisputed testimony at trial that the other union members who retired along with the plaintiff under the 1985 CBA also have been transitioned to Medicare.

Accordingly, to the extent that the record evidences a course of performance, it seems clear that the town consistently has required that all Medicare eligible employees enroll in Medicare. Furthermore, there is no

indication that the union, which is tasked with ascertaining that any change in a member's health plan comports with the requirements of article IX, § 1, of the 1985 CBA, ever exercised its right to challenge the transition to Medicare as providing benefits inferior to those afforded under the Blue Cross plan. For these reasons, we conclude that the trial court correctly determined that the 1985 CBA does not preclude the town from terminating the Gallaghers' private health insurance, so long as the town provides them with substantially similar benefits in the form of supplemental Medicare coverage.

B

The plaintiff also contends that the defendants illegally transferred him and his wife from private health insurance to Medicare without their consent. The plaintiff's concern appears to be that the town's benefits manager, Cheryl Lynch, signed her own name on the signature line in the written request to Anthem Blue Cross/Blue Shield (Anthem), the town's benefits management company, to enroll the Gallaghers in a Medicare supplemental insurance plan, rather than obtaining their signatures. In other words, there is no allegation that Lynch either forged any signatures or forced the Gallaghers to enroll in the Medicare program. Rather, she appears to have, through Anthem, enrolled the Gallaghers in a Medicare supplemental insurance plan so that they would be fully covered once their previous insurance policy was terminated.

Although the plaintiff contends that Lynch's action was illegal, he fails to cite any statute, regulation, or common-law rule that she is alleged to have violated. There is also no evidence in the record to rebut Lynch's testimony that Anthem permits the employer's agent to sign these forms when she enrolls members in new health insurance plans. Moreover, there is no indication

in the record that the trial court ever addressed this issue or made any related findings of fact, and the plaintiff has not requested an articulation. Because the record is inadequate and the claim is inadequately briefed, we decline to consider this claim. See, e.g., *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

III

We next turn our attention to the defendants' cross appeal. The defendants contend that the trial court, having correctly concluded that the 1985 CBA did not bar them from requiring that the Gallaghers enroll in Medicare in lieu of private health insurance, should not have required the town to reimburse the costs of the Gallaghers' Medicare premiums. We agree.

In reaching the conclusion that the town was contractually required to subsidize all of the Gallaghers' health insurance costs, including their Medicare premiums, the trial court was persuaded by two arguments. First, the trial court was persuaded by the fact that, whereas the 1985 CBA did not expressly reference Medicare, subsequent collective bargaining agreements between the town and the union have expressly required employees to participate in Medicare when they become eligible and also have specified that the costs of Medicare premiums are the responsibility of the retiree. The court reasoned that "[t]he fact that Medicare . . . [is] specifically referenced in [the 2010 CBA] and that the employee is now obligated to pay for that coverage seems both purposeful and deliberate. [The 2010 CBA] unambiguously places a new burden on the plaintiff which he did not have at the time of his retirement." In part II of this opinion, we explained why this reasoning, although possibly valid in other contexts, fails in the present case to account for the intervening change in federal Medicare law, which the parties to the 1985

CBA did not address or anticipate when they negotiated that agreement.[7]

Second, the trial court observed that the 1985 CBA obligates the town to defray the costs of "town paid health insurance coverage" and provides that present coverages and benefits will be maintained "without any additional qualifications." The court reasoned that requiring retirees to shoulder the costs of Medicare premiums in order to obtain insurance would establish, in essence, an additional qualification. The defendants argue, to the contrary, that the trial court, as a matter of law, failed to consider the fact that retirees such as the plaintiff are required to contribute to their health insurance costs under both plans. It is true that retirees now must pay $134 each month in Medicare premium costs, whereas the town paid private insurance plan under which the plaintiff retired required no fixed monthly contribution. However, the defendants note that those private plans had their own cost sharing components. Under the Blue Cross plan described in the 1985 CBA, for example, members had to pay deductibles and 20 percent coinsurance, to a maximum of $2000 per year. In addition, that plan had a maximum lifetime payout of one million dollars, whereas there is no lifetime maximum benefit under Medicare.[8]

We need not determine whether the defendants are correct that the plaintiff's benefits under Medicare are

[7] We also note that there was undisputed testimony at trial suggesting that the only retired union employees for whom the town pays Medicare Part B premiums are two sergeants who retired under a prior collective bargaining agreement that expressly provided that the town would subsidize the costs of their Medicare Part B premiums. It seems clear, then, that, when the parties intended that the town would reimburse employees' premium costs, they stated their intention expressly.

[8] Notably, before the trial court, the plaintiff testified that, as a result of an incident in 2016, he accrued medical bills approaching one million dollars. This fact suggests that, had he remained enrolled in the original Blue Cross plan, he might have been left to face this treatment uninsured.

comparable to those provided through the private plan under which he retired. Both in his briefs and at oral argument before this court, the plaintiff acknowledged that the town is required to provide him only with those health insurance benefits that are afforded to current active employees, rather than benefits comparable to those that he received under the 1985 CBA at the time of his retirement.[9] The plaintiff's counsel specifically conceded at oral argument before this court that, if active employees were to begin paying a share of their insurance premiums, then the plaintiff could be made to do so as well. In fact, sometime after 1986, the town ceased its practice of subsidizing the full costs of employee private health insurance. As noted, although the current collective bargaining agreement between the police union and the town was not admitted into evidence, the plaintiff did submit the 2010 CBA into evidence, and he has acknowledged that the 2010 CBA is typical of other subsequent collective bargaining agreements.

The 2010 CBA requires that active employees share the costs of their private health insurance. Beginning on July 1, 2009, for example, active employees were required to contribute $31 per week, or $134 per month, toward the cost of their private health coverage. Notably, $134 per month is the precise amount that the plaintiff alleges that he and his wife have been required to contribute toward their Medicare premiums. This is consistent with Lynch's testimony that the town's Medicare supplemental insurance health plan has been designed to mirror the plan available to current active employees and to retirees under the age of sixty-five.

[9] Because the plaintiff adopts this interpretation, we need not determine whether he accurately interprets article IX, § 7, of the 1985 CBA to mean that employees who retired under the disability retirement provisions of the town's retirement plan would continue to receive the same benefits as the town's active employees, as those benefits changed over time.

In addition, beginning in March, 2013, active employees were required to contribute between 11 and 13 percent of the blended per employee rate for the town's premium equivalent costs—its total health care costs. At oral argument before this court, the town's counsel represented that these cost sharing provisions remain in effect, and the plaintiff has not contended otherwise.

Because the plaintiff concedes that he may be required to contribute the same amount as active union employees, and because the evidence submitted by the plaintiff suggests that he is paying no more for his health insurance than the town's active employees, we agree with the defendants that the trial court should not have required the town to reimburse the Gallaghers' Medicare premium costs.

The judgment of the trial court is reversed with respect to the requirement that the town reimburse the Gallaghers' Medicare premium costs and is affirmed in all other respects, and the case is remanded with direction to render judgment consistent with this opinion.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ROY D. L.*
(SC 20152)

Robinson, C. J., and McDonald, Mullins, Kahn, Ecker and Keller, Js.

Syllabus

Convicted, after a trial to the court, of sexual assault in the first degree, sexual assault in the fourth degree, and risk of injury to a child in connection with the sexual abuse of his daughter, R, when she was

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

ten years old, the defendant appealed to this court. During a forensic interview conducted in response to R's statement to a camp counselor that the defendant had been touching her inappropriately, R stated that the defendant had on multiple occasions touched her vagina and vaginal area. R also reported that the defendant's conduct caused her to experience pain and made her feel uncomfortable. At trial, the court admitted, over defense counsel's objection, a video recording of the forensic interview, and the defendant, through his own testimony, denied inappropriately touching R. In addition, the defendant presented the testimony of his sister and former girlfriend, S, both of whom testified that R experienced dry skin around her vaginal area. S testified that the defendant supervised R as she cleaned herself but did not touch her directly. The court found R's account to be credible and rejected the contrary testimony offered by the defendant. *Held*:

1. The trial court did not abuse its discretion in admitting the video recording of R's forensic interview into evidence under the medical treatment exception to the hearsay rule: the interview took place in a hospital, during which a forensic interviewer asked R about her physical and mental well-being, and the interviewer testified at the defendant's trial that, as a result of the substance of R's statements during the interview, she encouraged a medical examination of and therapy for R; accordingly, on the basis of R's statements and the circumstances in which they were made, including the location of the interview and the nature of the interviewer's questions, an objective observer reasonably could infer that R's statements were made for the purpose of receiving medical treatment and were pertinent to that end.
2. The defendant could not prevail on his claim that he was deprived of a fair trial on the ground that the prosecutor improperly referred to facts not in evidence and commented on the credibility of a witness insofar as he mischaracterized the testimony of J, the defendant's former girlfriend, by stating that J had previously admitted that she saw the defendant inappropriately touch R: even if the prosecutor's statements were improper, this court was provided with the requisite assurance that the defendant was not deprived of a fair trial, as the trial court, which was the trier of fact, expressly rejected the allegedly improper statements, it having acknowledged, following defense counsel's objection to the prosecutor's remarks concerning J, the concerns that motivated the objection and having stated that it would not consider the prosecutor's statements in determining the defendant's guilt; moreover, the court noted that, if the prosecutor's comments regarding J had been made during a jury trial, it would have instructed the jury that it was its recollection of the evidence that controlled, and there was no evidence that the court failed to follow its own instructions.
3. The defendant could not prevail on his claims that the evidence was insufficient to prove that he engaged in the criminal conduct described by R during her forensic interview and at trial because he presented

witnesses who contradicted R's testimony, and that the evidence was insufficient to prove that he acted with the intent to degrade or humiliate R, or that he gained sexual gratification from engaging in the conduct in question, for purposes of his conviction of sexual assault in the fourth degree: the trial court credited R's testimony and discredited the contradictory testimony offered by the defense, and R's testimony was sufficient to support the court's conclusion that the defendant engaged in the criminal conduct on which his conviction was based; moreover, there was sufficient evidence to establish that the defendant acted with the necessary intent to be convicted of sexual assault in the fourth degree, as the evidence adduced by the state, including R's testimony, was sufficient to support the trial court's conclusions that the defendant's contact with R's intimate parts, despite her repeated pleas to him that he stop, was made for the purpose of degrading or humiliating her, and that the defendant acted for the purpose of his sexual gratification.

4. Contrary to the defendant's claim, the statutes criminalizing sexual assault in the first degree and risk of injury to a child were not unconstitutionally vague as applied to the defendant's conduct; the language of those statutes and the relevant judicial decisions interpreting them provide a person of ordinary intelligence with fair notice that the digital penetration of a child's vagina and the touching of a child's vagina with a rag in a sexual and indecent manner are criminally prohibited.

Argued January 14—officially released July 28, 2021**

Procedural History

Substitute information charging the defendant with two counts each of the crimes of sexual assault in the third degree, sexual assault in the fourth degree, and risk of injury to a child, and one count of the crime of sexual assault in the first degree, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Gold*, *J.*; thereafter, the court, *Gold*, *J.*, granted the defendant's motion for a judgment of acquittal as to both counts of sexual assault in the third degree; subsequently, finding of guilt with respect to two counts of risk of injury to a child and one count each of sexual assault in the first degree and sexual assault in the fourth degree; thereafter, the court, *Gold*, *J.*, vacated the defendant's conviction as to one count of risk of

** July 28, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

injury to a child and rendered judgment of conviction, from which the defendant appealed to this court. *Affirmed.*

Trent A. LaLima, with whom, on the brief, was *Hubert J. Santos*, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, *Gail P. Hardy*, former state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

Opinion

KAHN, J. Following a trial to the court, *Gold*, *J.*, the defendant, Roy D. L., was convicted of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A), and risk of injury to a child in violation of General Statutes § 53-21 (a) for the sexual abuse of his daughter, R. On appeal,[1] the defendant claims that (1) the trial court abused its discretion in admitting into evidence a video recording of R's forensic interview under the medical treatment exception to the hearsay rule, (2) the prosecutor improperly introduced facts not in evidence and commented on the credibility of a witness during closing argument, thereby depriving him of a fair trial, (3) the evidence presented at trial was insufficient to support his convictions, and (4) the statutes criminalizing sexual assault in the first degree and risk of injury to a child are unconstitutionally vague as applied to his conduct. We disagree with each of the defendant's claims and, accordingly, affirm the judgment of the trial court.

The following facts, which are either undisputed or reasonably could have been found by the trial court, and procedural history are relevant to this appeal. The

[1] The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3).

defendant's conviction stems from his sexual contact with R in 2015, when she was ten years old. The defendant's inappropriate touching of R first came to light in 2008, when R, who was just three years old at the time, reported to an employee of her school that the defendant had "hurt her pooky," referring to her vagina. The school reported R's statement to the Department of Children and Families (department), which immediately opened an investigation. That day, a representative of the department spoke with the defendant, who stated that R had a medical condition that required him to regularly clean her vaginal area with a cloth and Vaseline. The defendant claimed that he "was the only one [who] knew how to clean [R's] genitals."

During the course of the department's investigation, R was examined by Audrey Courtney, an advanced practice registered nurse at the Saint Francis Hospital Children's Advocacy Center (Children's Advocacy Center). At trial, Courtney testified that, prior to her examination of R, the defendant described to her "some hygiene practices where he was separating [R's] labia after he would wash her." Courtney testified that, during the examination, she did not observe any condition on R's skin that would have necessitated the defendant's conduct. In the hopes of steering the defendant toward more appropriate and less intrusive hygiene practices, Courtney recommended to the defendant that he stop physically cleaning R's vaginal area and use a sitz bath instead.

As a part of its investigation, the department filed a neglect petition against the defendant. In the subsequent proceedings, the defendant signed a written agreement in which he committed to stop physically cleaning R's vaginal area and acknowledged that the cleaning practices recommended by the Children's Advocacy Center and R's pediatrician were more appro-

priate.[2] According to R's mother, the defendant stopped bathing R after the signing of the agreement, and she assisted R with her daily hygiene until she was eight years old. In 2013, the defendant and R's mother separated, and R began splitting time between her mother's residence and the defendant's residence.

In July, 2015, when R was ten years old, she reported to a camp counselor that the defendant had been "touching" her. The counselor reported R's statement to the department, and a second investigation was opened into the defendant's conduct. On August 19, 2015, R was once again taken to the Children's Advocacy Center where she participated in a forensic interview conducted by Lindsay Craft, a trained forensic interviewer. During that interview, R told Craft that, while she was staying at his home, the defendant had, on multiple occasions over the prior year, touched her vagina and vaginal area after she had showered. R described how the defendant, using a rag, would spread Vaseline over her entire naked body and penetrate her vagina using his fingers. R told Craft that the defendant's conduct caused her physical pain and made her feel uncomfortable.

The defendant was subsequently arrested and charged with one count of sexual assault in the first degree, two counts of sexual assault in the third degree, two counts of sexual assault in the fourth degree, and two counts

[2] The court, *Simón, J.*, ultimately granted the defendant's motion for a directed verdict during the trial of the neglect petition filed against the defendant, but that court also advised the defendant "to very carefully consider the recommendations of the doctors and what they believe to be the appropriate way to address the concerns that you believe exist with your daughter and proceed in the proper medically advised manner."

During trial in the present case, the state introduced the defendant's written agreement to show that he had acknowledged that his cleaning methods were unnecessary and that he had agreed to stop touching R's vagina.

of risk of injury to a child.[3] The defendant affirmatively elected a bench trial. At trial, the court admitted, over defense counsel's objection, a video recording of R's forensic interview in its entirety pursuant to the medical treatment exception to the hearsay rule. See Conn. Code Evid. § 8-3 (5).

At the trial's conclusion, the court found the defendant guilty of one count of sexual assault in the first degree, one count of sexual assault in the fourth degree, and two counts of risk of injury to a child.[4] In its oral decision, the trial court expressly credited R's testimony and rejected the defendant's contention that R's "account [was] a wholesale fabrication" and that he was "being set up by R's mother and [the department] . . . ." The trial court sentenced the defendant to a total effective sentence of fifteen years of imprisonment, execution suspended after nine years, followed by twenty years of probation and one year of special parole. The defendant was also ordered to register as a sex offender. The defendant subsequently appealed to this court. Additional facts and procedural history will be set forth as necessary.

In the present appeal, the defendant raises four separate claims of error. First, the defendant argues that the trial court abused its discretion by admitting the

[3] The information did not identify the specific acts that corresponded to each count, and the defendant did not request a bill of particulars. At the close of the state's case-in-chief, however, defense counsel moved for a judgment of acquittal on counts one through five, and, during argument on that motion, the prosecutor specified that one count of sexual assault in the fourth degree, count four, related to the defendant's contact with R's vagina, and the second count of sexual assault in the fourth degree, count five, related to the defendant's contact with her breasts.

[4] The trial court found the defendant not guilty on the second count of sexual assault in the fourth degree and granted defense counsel's motion for a judgment of acquittal as to both counts of sexual assault in the third degree. At sentencing, the trial court also vacated the defendant's conviction of one count of risk of injury to a child based on double jeopardy grounds.

video recording of the forensic interview of R into evidence under the medical treatment exception to the hearsay rule because the interview "had virtually no medical purpose . . . ."[5] Second, the defendant contends that the prosecutor engaged in prosecutorial impropriety during his closing argument by mischaracterizing the testimony of Jessica Jackson, the defendant's former girlfriend, thereby depriving him of a fair trial. Third, the defendant argues that the state's evidence was insufficient to support his conviction on all counts. Finally, the defendant contends that the statutes criminalizing sexual assault in the first degree, § 53a-70 (a) (2), and risk of injury to a child, § 53-21 (a) (2), are unconstitutionally vague as applied to his conduct. We address these claims in turn.

I

The defendant argues that, because the forensic interview of R had "virtually no medical purpose" and was conducted to "create admissible, inculpatory evidence," the video recording was inadmissible under our case law interpreting the scope of the medical treatment exception contained in § 8-3 (5) of the Connecticut Code of Evidence. According to the defendant, he was prejudiced by the admission of the video recording because it corroborated R's in-court testimony and caused the trial court to credit R's testimony over the contradictory testimony presented by the defendant's witnesses. The state, in response, argues that the video recording of the interview is admissible under the exception because medical treatment or diagnosis was *a* purpose of the interview, and, given the circumstances surrounding the interview, R "necessarily would have

[5] This court ordered the parties to file supplemental briefs "addressing the effect on [this] appeal, if any, of [our] recently released decision in *State* v. *Manuel T.*, 337 Conn. 429, 254 A.3d 278 (2020), with respect to the issue regarding the admission of forensic interview evidence under the medical treatment exception to the hearsay rule."

understood the interview to have a medical purpose." We agree with the state.

The following additional facts and procedural history are relevant to our consideration of this claim. We begin by describing the contents of the video recording of R's forensic interview at the Children's Advocacy Center. At the outset of the interview, Craft introduced herself to R and explained that her job was to talk to children "about things that have happened to them . . . that just made them feel uncomfortable." Craft told R that people she worked with were observing the interview through a one-way mirror and that their observation of the interview would prevent her from having to "talk about the same thing over and over and over again." Craft then stated that the observers "want to make sure that [children's] bodies are okay, that [the children are] okay." Craft also noted that she worked for the hospital, not the department.

During the interview, R described the defendant's practice of touching her vaginal area with a rag after she showered at the defendant's home. In response to Craft's questions about the precise nature of the defendant's conduct, R stated that, after she exits the shower, the defendant frequently directs her to lie naked on his bed, and then applies Vaseline to her entire body, including her vagina, using a rag. R told Craft that it was physically painful, stating that the defendant "uses a rough rag and . . . goes in hard and sometimes when he's done doing it, it aches hard." R also told Craft that the defendant "digs through it and its hurts" and that "he [takes] the rag and he goes through it in like the dark spots . . . ." Toward the end of the interview, Craft asked R if she "worries about [her] body because of [what happened]?" R responded, "yes," and then wondered aloud, "am I going to have to survive this when I'm older?"

During trial, the prosecutor moved to admit the entirety of the video recording under the medical treatment exception to the hearsay rule. In support of this motion, the prosecutor presented testimony from Craft.[6] Craft testified that she is a trained social worker who, at the time of her employment at the Children's Advocacy Center, was responsible for conducting forensic interviews of children. Craft noted that the "purpose of a forensic interview is for medical treatment and diagnosis of the child" and that, during her interview of R, she specifically inquired about R's physical and mental well-being. Craft further remarked that, following her interview with R, she "strongly encouraged . . . a medical examination, as well as . . . therapy for the child." Craft explained that she made this recommendation because R "reported significant pain on multiple incidents . . . she also had concerns about her body . . . [and she] worried . . . [it] was going to happen again . . . ."

Defense counsel objected to the admission of the video recording and argued that the interview was "a fig leaf to cover [a] law enforcement practice" and that, "while medical treatment does not need to even be the primary purpose," the state failed to even satisfy "a de minimis test."[7] In response, the prosecutor argued that

[6] Prior to calling Craft, the prosecutor moved to admit the video recording based on the testimony of Lisa Murphy-Cipolla, an employee of the Children's Advocacy Center who was not present during Craft's interview of R. The trial court denied the state's motion on the ground that Murphy-Cipolla had not conducted the interview. Several days later, the state arranged for Craft, who was living out of state at the time of trial, to travel to court to testify.

[7] As was the case in *State* v. *Manuel T.*, 337 Conn. 429, 254 A.3d 278 (2020), the trial court in the present case assessed the admissibility of the video recording of the forensic interview in its entirety and did not assess the admissibility of individual statements made during the interview. We recognize that the trial court's approach was likely a reflection of the position taken by defense counsel who, in opposing the prosecutor's motion to admit the video recording, argued that the recording should be excluded in its entirety. In response to defense counsel's "all or nothing" approach, the trial court remarked, "[s]o, it's either in or it's out, and if it's in, it can be played in its entirety." Given the formulation of defense counsel's opposition

the video recording was admissible because Craft established that the purpose of the interview, "at least in part," was "medical treatment . . . ." The trial court, citing *State* v. *Griswold*, 160 Conn. App. 528, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015), and *State* v. *Eddie N. C.*, 178 Conn. App. 147, 174 A.3d 803 (2017), cert. denied, 327 Conn. 1000, 176 A.3d 558 (2018), as well as other Appellate Court decisions, concluded that the video recording satisfied the standard for admissibility and overruled defense counsel's objection.

Our standard of review for evidentiary claims is well settled. "We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . The trial court has wide discretion to determine the relevancy [and admissibility] of evidence . . . . In order to establish reversible error on an evidentiary impropriety . . . the defendant must prove both an abuse of discretion and a harm that resulted from such abuse." (Citations omitted; internal quotation marks omitted.) *State* v. *Cecil J.*, 291 Conn. 813, 818–19, 970 A.2d 710 (2009).

"It is well settled that . . . [a]n out-of-court statement offered to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception to the general rule applies." (Internal quotation

to the admission of the video recording, as well as the fact that the present case was tried before the court, we believe that the trial court's response was reasonable. We do, however, take this opportunity to emphasize that the purpose underlying the medical treatment exception to the hearsay rule does not preclude a party from objecting to portions of statements made during forensic interviews that are either inadmissible for the purpose they are offered or are otherwise unduly prejudicial. Under such circumstances, the court, particularly during a jury trial, may exercise its discretion to redact portions of a forensic interview.

marks omitted.) *State* v. *Carrion*, 313 Conn. 823, 837, 100 A.3d 361 (2014); see also Conn. Code Evid. § 8-3 (5). Section 8-3 (5) of the Connecticut Code of Evidence excludes from the hearsay rule "[a] statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment." The rationale for admitting such statements "is that the patient's desire to recover his health . . . will restrain him from giving inaccurate statements to [those who] advise or treat him." (Internal quotation marks omitted.) *State* v. *Cruz*, 260 Conn. 1, 7, 792 A.2d 823 (2002).

As we recently noted in *State* v. *Manuel T.*, 337 Conn. 429, A.3d (2020), § 8-3 (5) "sets forth . . . a two-pronged test. The first [prong] addresses the declarant's purpose or motivation in the making of the statement, and the second addresses the pertinence of the statement to that end." Id., 439. The application of the medical treatment exception, therefore, turns in the first instance on the declarant's state of mind and the purpose for which each individual statement was made. See id., 447 (noting that "the medical treatment exception focuses on the declarant's [understanding of the] purpose in making individual statements"). The purpose prong is satisfied so long as the declarant's statement was motivated, at least in part, by a desire to obtain medical treatment or a diagnosis. See id., 440–41 n.12; see also *State* v. *Griswold*, supra, 160 Conn. App. 552–53 (noting that medical treatment or diagnosis does not have to be principal motivation of statement for it to be admissible under medical treatment exception).

In cases involving juveniles, the Appellate Court has consistently recognized that the motivation behind a juvenile's statement can be inferred from both the con-

tent of the statement and the surrounding circumstances. See, e.g., *State* v. *Griswold*, supra, 160 Conn. App. 556 ("[a]lthough [t]he medical treatment exception to the hearsay rule requires that the statements be both pertinent to treatment and motivated by a desire for treatment . . . in cases involving juveniles, [we] have permitted this requirement to be satisfied inferentially" (internal quotation marks omitted)); see also *State* v. *Ezequiel R. R.*, 184 Conn. App. 55, 69, 194 A.3d 873 (concluding that "circumstances leading up to the victim's interview . . . could lead an objective observer to reasonably infer that the victim's statements were given in order to obtain medical treatment and diagnosis"), cert. granted, 330 Conn. 945, 196 A.3d 804 (2018) (appeal dismissed February 15, 2019); *State* v. *Telford*, 108 Conn. App. 435, 443, 948 A.2d 350 (testimony of twelve year old declarant and circumstances surrounding interview permitted inference that statements were made for purpose of medical treatment), cert. denied, 289 Conn. 905, 957 A.2d 875 (2008); *State* v. *Donald M.*, 113 Conn. App. 63, 71, 966 A.2d 266 (statements by interviewer supported inference that child understood interview had medical purpose), cert. denied, 291 Conn. 910, 969 A.2d 174 (2009). Although some jurisdictions have refrained from adopting such an approach; see, e.g., *State* v. *Coates*, 405 Md. 131, 143–45, 950 A.2d 114 (2008); the overwhelming majority of jurisdictions have recognized that the purpose of a juvenile declarant's statement can be inferred under such circumstances. See, e.g., *United States* v. *Kootswatewa*, 893 F.3d 1127, 1132–34 (9th Cir. 2018) (evidence that juvenile's statements were made "in response to questions posed by a medical professional during a medical examination conducted at a medical facility" supported inference that juvenile understood she was providing information for diagnosis or treatment); see also *United States* v. *Norman T.*, 129 F.3d 1099, 1101,

1105–1106 (10th Cir. 1997) (evidence that five year old declarant complained of pain to doctor in hospital supported inference that declarant was seeking medical treatment), cert. denied, 523 U.S. 1031, 118 S. Ct. 1322, 140 L. Ed. 2d 485 (1998); *State* v. *Letendre*, 161 N.H. 370, 372, 374–75, 13 A.3d 249 (2011) (circumstances surrounding statements supported inference that ten year old victim's statements were made for purpose of obtaining medical diagnosis or treatment); *State* v. *McLeod*, 937 S.W.2d 867, 871–72 (Tenn. 1996) (evidence that eleven year old declarant discussed her medical history and circumstances of alleged assault with doctor supported inference that statements were made for purpose of medical treatment).

We conclude that the reasoning adopted by the majority of jurisdictions is persuasive and consistent with our case law concerning the medical treatment exception to the hearsay rule. In *Manuel T.*, we noted that "the proper application of the existing medical treatment hearsay exception . . . [can] ensure the reliability of . . . statements made at a forensic interview." *State* v. *Manuel T.*, supra, 337 Conn. 448. In cases in which the substance of a juvenile declarant's statement and the circumstances surrounding the statement support an inference that the statement was made in furtherance of obtaining medical treatment, a trial court can reasonably conclude that the purpose prong of the medical treatment exception is satisfied. See *United States* v. *Kootswatewa*, supra, 893 F.3d 1133; see also *State* v. *Telford*, supra, 108 Conn. App. 441 (statements admissible under medical treatment exception if "objective circumstances of the interview would support an inference that a juvenile declarant knew of its medical purpose").

As we have previously noted, the rationale behind the medical treatment exception is that a person's "desire to recover his [or her] health" incentivizes them to tell

the truth to individuals involved in their medical care. (Internal quotation marks omitted.) *State* v. *Cruz*, supra, 260 Conn. 7. We agree with the Appellate Court that the presumption that such statements are reliable applies to statements made during a forensic interview when the surrounding circumstances "could lead an objective observer to reasonably infer that the victim's statements were given in order to obtain medical treatment and diagnosis."[8] *State* v. *Ezequiel R. R.*, supra, 184 Conn. App. 69; see also *State* v. *Abraham*, 181 Conn. App. 703, 713, 187 A.3d 445 ("the statements of a declarant may be admissible under the medical treatment exception if made in circumstances from which it reasonably may be inferred that the declarant understands that the interview has *a* medical purpose" (emphasis in original)), cert. denied, 329 Conn. 908, 186 A.3d 12 (2018).

With this principle in mind, we consider whether the trial court abused its discretion in admitting the video recording of the forensic interview of R under the medical treatment exception.[9] Craft's interview with R took

[8] In *Manuel T.*, we expressly declined to address whether such an inference can be made in cases involving children "too young to have the conscious purpose of obtaining medical treatment to advance [their] own health." *State* v. *Manuel T.*, supra, 337 Conn. 441 n.12, citing *State* v. *Dollinger*, 20 Conn. App. 530, 536, 568 A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990); see *State* v. *Dollinger*, supra, 536–37 (inferring that statements of two and one-half year old child were made for purpose of obtaining medical treatment). We need not address the issue because, as was the case in *Manuel T.*, the declarant in the present case was old enough to have the conscious purpose of obtaining medical treatment.

[9] In support of his claim that the trial court abused its discretion in admitting the video recording of the interview of R, the defendant mistakenly focuses the entirety of his argument on the purpose of the interview and fails to address whether R's statements were motivated by a desire to receive medical treatment and were pertinent to that end. Although the purpose of the interview and the declarant's understanding of that purpose are relevant to determining the motivation of the declarant; see *State* v. *Donald M.*, supra, 113 Conn. App. 71 (considering purpose of interview when determining purpose of declarant's statements); the admissibility of specific statements, as we made clear in *Manuel T.*, turns on the "purpose for which the

place in a hospital. At the very beginning of the interview, Craft told R that she "work[ed] for the hospital" and that people who "[she] work[s] with" were observing the interview because they "want to make sure that [children's] bodies are okay and that [the children are] okay . . . ." During the course of the interview, Craft asked R about her physical and mental well-being. In response to these questions, R stated that her vagina "ache[d] hard" as a result of the defendant "dig[ging] through" the "deep dark" part. R also stated that she was "scared a lot" due to the defendant's conduct and that she worried about the impact the abuse would have on her body. R also expressed concern that she would "have to survive this when I'm older . . . ."

At trial, Craft testified that as a result of R's statements during the interview, she "strongly encouraged . . . a medical examination, as well as . . . therapy for the child." Craft further testified that, although she does not always make a medical referral after each interview, she did so in this case because R "reported significant pain on multiple incidents . . . she also had concerns about her body . . . [and she] worried . . . [it] was going to happen again . . . ." Based on the substance of R's statements and the circumstances in which they were made, including the location of the interview and the nature of Craft's questions, an objective observer could reasonably infer that R's statements were both made for the purpose of receiving medical treatment and pertinent to that end. We, therefore, conclude that

statement was made," not the overall purpose of the interview. (Internal quotation marks omitted.) *State* v. *Manuel T.*, supra, 337 Conn. 443, quoting *State* v. *Mendez*, 148 N.M. 761, 772, 242 P.3d 328 (2010); see also *State* v. *Dollinger*, 20 Conn. App. 530, 536, 568 A.2d 1058 (noting that "[t]he test focuses on the declarant's motives"), cert. denied, 215 Conn. 805, 574 A.2d 220 (1990). In *Manuel T.*, we noted that "the tender years exception considers the purpose of the interview, whereas the medical treatment exception focuses on the declarant's purpose in making individual statements." *State* v. *Manuel T.*, supra, 447.

the trial court did not abuse its discretion in admitting the video recording of the forensic interview under the medical treatment exception to the hearsay rule.

II

The defendant next claims that the prosecutor deprived him of his right to a fair trial by improperly referring to facts not in evidence and by expressing his opinion regarding the credibility of a witness during the course of closing arguments. Specifically, the defendant contends that the prosecutor mischaracterized the testimony of Jackson, the defendant's former girlfriend, when he stated that she had previously admitted to having seen the defendant inappropriately touch R. In response, the state argues that the prosecutor's statement was proper because it was based on a reasonable inference drawn from Jackson's testimony and, "at worst, [was] an honest recollection of the evidence based on the evasiveness of Jackson's testimony . . . ." In the alternative, the state contends that, even if the statement was improper, it did not deprive the defendant of a fair trial. Having reviewed the record, we agree with the state and conclude that the allegedly improper remark did not deprive the defendant of a fair trial.

The following additional facts and procedural history are relevant to our consideration of the defendant's claim. During trial, the prosecutor called Jackson as a witness. At the beginning of his direct examination, the prosecutor asked Jackson if she had ever witnessed the defendant wash R or wipe R's vaginal area. Jackson responded in the negative, and the following colloquy ensued between Jackson and the prosecutor:

"Q. Now . . . did you have a conversation when you were reached out to by Detective [Jason] Pontz?

"A. Yes.

"Q. And did you acknowledge that—did you tell him that you did witness that?

"A. No. I can clarify that. Basically, [the defendant] was just telling [R] what to do to make sure that [she] was clean.

"Q. Oh, so you're familiar with what I'm talking about?

"A. Yes, I am.

"Q. Can you describe what you saw?

"A. So, [R] was just [lying] on the bed, and [the defendant] was letting her know what to do to make sure she was clean.

"Q. How was [the defendant] doing it?

"A. [The defendant] didn't do it.

"Q. Well, what was being done?

"A. [R] was just wiping with the rag.

"Q. [R] was wiping with a rag. [The defendant] did not have it in his hand?

"A. No."

After asking Jackson for more details about how R used the rag, the prosecutor asked, "[a]nd do you recall having a conversation with my office saying that you saw [the defendant] wiping R's vaginal area with the rag?" Jackson responded "no," and again stated that she was "just clarifying that [R] did it. [The defendant] may have had the rag at one point, but [R] did it." Toward the end of his direct examination, the prosecutor again questioned Jackson about a discrepancy between her prior statement to the police and her trial testimony. The following colloquy then ensued between Jackson and the prosecutor:

"Q. Did you tell [the defendant] what you had told . . . Pontz or a member of my office?

"A. Yes.

"Q. And how come it's different today than what you had told them?

"A. Well, when you called me, I was actually . . . on my lunch break. I was driving. I was on the phone, so it was a bad time.

"Q. Would you agree that what you told me was essentially what you told . . . Pontz previously?

"A. Yes.

"Q. That you were somewhat put on the spot when you told me that information?

"A. Right.

"Q. Even though you said the same thing to . . . Pontz a week prior?

"A. Yes.

"Q. But today you have the ability to clarify all of that [information]?

"A. Yes, and that's because I took the time to recall certain events.

"Q. And none of that—none of your clarification was influenced by you speaking with [the defendant]?

"A. Not at all."

During his closing argument, the prosecutor stated that "Jackson came in and acknowledged that she witnessed the defendant engaged in this conduct [of cleaning R's vagina]. And she told . . . Pontz . . . and she told me that information." Defense counsel immediately objected and moved for a mistrial, arguing that the prosecutor's statement was not supported by facts in

evidence and represented his personal opinion about the veracity of Jackson's testimony and her credibility as a witness. The trial court denied the motion and stated the following in support of its decision: "I know what . . . Jackson testified to and what she didn't testify to. And I'm going to make my decision based on what she testified to. . . . I understand the difference. This is an argument to the court. The court is not going to, you know, fall victim to the concerns that you've expressed in your motion for a mistrial. . . . And I have the luxury in this case to be able to rehear the testimony of the witness to the extent I have any uncertainty about precisely what . . . Jackson said or didn't say. . . . So I understand what . . . Jackson testified to, and I understand that [the prosecutor] may have attempted to bring into question the veracity of what she was saying on the stand. I understand also, however, that, even with that effort to impeach, the opposite doesn't become true by virtue of the impeachment. I understand that. . . . The motion for a mistrial is denied. The court did not, incidentally, take the words of [the prosecutor] in the way that [defense counsel] has described them. But, for the reasons I've stated, I will render my decision based on the testimony that the witnesses have given and not any part of the closing argument that may have strayed intentionally or inadvertently, if at all, from the rules that govern the arguments of counsel."

We begin our analysis of the defendant's claim by setting out the legal principles that govern our consideration of claims of prosecutorial impropriety. "[T]he touchstone of due process analysis in cases of alleged prosecutorial [impropriety] is the fairness of the trial, and not the culpability of the prosecutor. . . . The issue is whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . In determining

whether the defendant was denied a fair trial . . . we must view the prosecutor's comments in the context of the entire trial." (Internal quotation marks omitted.) *State* v. *Santiago*, 269 Conn. 726, 733–34, 850 A.2d 199 (2004).

As we previously have recognized, "[p]rosecutorial [impropriety] of [a] constitutional magnitude can occur in the course of closing arguments. . . . In determining whether such [impropriety] has occurred, the reviewing court must give due deference to the fact that [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Otto*, 305 Conn. 51, 76–77, 43 A.3d 629 (2012); see also *State* v. *Williams*, 204 Conn. 523, 544, 529 A.2d 653 (1987) ("[s]tatements as to facts which have not been proven amount to unsworn testimony that is not the subject of proper closing argument").

Furthermore, "a prosecutor may not express his own opinion, directly or indirectly, as to the credibility of the witnesses. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . [B]ecause the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters not in evidence . . . it is likely to infer that such matters precipitated the personal

opinions." (Internal quotation marks omitted.) *State* v. *Bermudez*, 274 Conn. 581, 590, 876 A.2d 1162 (2005).

Our determination of whether alleged prosecutorial impropriety deprived a defendant of a fair trial is governed by a "two step analytical process." *State* v. *Fauci*, 282 Conn. 23, 32, 917 A.2d 978 (2007). "The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Citations omitted.) Id.

"The latter part of this two-pronged test is guided by the factors set forth in *State* v. *Williams*, [supra, 204 Conn. 540]." *State* v. *Gonzalez*, 338 Conn. 108, 125, 257 A.3d 283 (2021). These factors include "whether (1) the impropriety was invited by the defense, (2) the impropriety was severe, (3) the impropriety was frequent, (4) the impropriety was central to a critical issue in the case, (5) the impropriety was cured or ameliorated by a specific jury charge, and (6) the state's case against the defendant was weak due to a lack of . . . evidence." *State* v. *Fauci*, supra, 282 Conn. 51. The burden is on the defendant to establish that the complained of conduct was both improper and so egregious that it resulted in a denial of due process. See, e.g., *State* v. *Payne*, 303 Conn. 538, 562–63, 34 A.3d 370 (2012).

In this case, we need not decide whether the prosecutor's statements were improper because, even if they were, they did not deprive the defendant of a fair trial. See, e.g., *State* v. *Gibson*, 302 Conn. 653, 663 n.4, 31 A.3d 346 (2011) (noting that "this court occasionally

has skipped the first step of [the two step prosecutorial impropriety] analysis when . . . it was clear that there was no due process violation"). Although some of the *Williams* factors weigh in the defendant's favor, the fact that this case was tried to the court, not before a jury, is largely dispositive of the defendant's claim.[10] Here, the trier of fact expressly rejected the allegedly improper statements, and, as a result, we are provided with the requisite assurance that the defendant was not deprived of his right to a fair trial.

On appeal from a bench trial, there is a presumption that the court, acting as the trier of fact, considered only properly admitted evidence when it rendered its decision. See *State* v. *Ouellette*, 190 Conn. 84, 92, 459 A.2d 1005 (1983) (noting that "[i]n trials to the court, where admissible evidence encompasses an improper as well as a proper purpose, it is presumed that the court used [the evidence] only for an admissible purpose"); see also *State* v. *George A.*, 308 Conn. 274, 290, 63 A.3d 918 (2013). This principle is widely recognized by both federal and state courts. See, e.g., *Harris* v. *Rivera*, 454 U.S. 339, 346, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981) ("[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions"); see also *United States* v. *DNRB, Inc.*, 895 F.3d 1063, 1068 (8th Cir. 2018) ("we presume that a judge conducting a bench trial will use

[10] Although this factor is dispositive in the present case, it will not always be so. Prosecutorial impropriety of a particularly egregious nature could, under certain circumstances, significantly impact a trial court's consideration of the issues presented and, as a result, deprive a defendant of a fair trial. Indeed, in discussing the potential harm that improperly admitted evidence can have on the fairness of a civil bench trial, this court has previously noted that "[t]here may be instances where it is so unclear what effect the disputed evidence might have had, or where its prejudicial effect is so overwhelming, that the fair administration of justice requires a new trial." *Ghiroli* v. *Ghiroli*, 184 Conn. 406, 409, 439 A.2d 1024 (1981). The same is true in cases involving alleged prosecutorial impropriety, and, as such, each case must be decided on its specific facts.

evidence properly, mitigating any prejudice"); *United States* v. *Foley*, 871 F.2d 235, 240 (1st Cir. 1989) ("in criminal bench trials, absent an affirmative showing of prejudice, a trial court is presumed to have considered only admissible evidence in making its findings"); *United States* v. *Martinez*, 333 F.2d 80, 82 (2d Cir.) (noting that "when a case is tried without a jury, the error of admitting incompetent evidence will be regarded harmless, if it is rejected and excluded by the judge before the decision is made" (internal quotation marks omitted)), cert. denied, 379 U.S. 907, 85 S. Ct. 199, 13 L. Ed. 2d 178 (1964); *People* v. *Mascarenas*, 181 Colo. 268, 272, 509 P.2d 303 (1973) ("[i]t is presumed that a trial judge disregards incompetent evidence"); *Commonwealth* v. *Davis*, 491 Pa. 363, 372 n.6, 421 A.2d 179 (1980) ("[a] judge, as [fact finder], is presumed to disregard inadmissible evidence and consider only competent evidence").

Both federal and state courts have also applied the principles underlying this presumption in cases involving claims of prosecutorial impropriety during bench trials. In the absence of a showing of substantial prejudice, the trial court is presumed to have disregarded improper arguments or comments made by the prosecutor when rendering its decision. See, e.g., *United States* v. *Weldon*, 384 F.2d 772, 774 (2d Cir. 1967) ("appellate courts may presume that improper evidence *and* comments have been rejected when the trial is to the [c]ourt alone, at least absent a showing of substantial prejudice" (emphasis added)); see also *United States* v. *Preston*, 706 F.3d 1106, 1120 (9th Cir. 2013) ("[t]he risk of improperly influencing a judge by placing the prestige of the government in favor of or against a witness or swaying the judge with improper evidence is far less than in a jury trial"), rev'd in part on other grounds, 751 F.3d 1008 (9th Cir. 2014); *Liggett* v. *People*, 135 P.3d 725, 733–34 (Colo. 2006) (presuming that trial court did not "accord weight to the [prosecutor's] improper

statements in its decision" during bench trial); *State* v. *Smith*, 61 Ohio St. 3d. 284, 292, 574 N.E.2d 510 (1991) (holding that claim of prosecutorial impropriety lacked merit when trial was to court and presiding judge "affirmatively rejected the prosecutor's comments"), cert. denied, 502 U.S. 1110, 112 S. Ct. 1211, 117 L. Ed. 2d 449 (1992); *Commonwealth* v. *Harvey*, 514 Pa. 531, 537, 526 A.2d 330 (1987) ("we will not *assume* that a verdict rendered by a jurist was influenced by [the prosecutor's] extraneous prejudicial remarks and comments" (emphasis in original)).[11]

We conclude that this reasoning is persuasive and consistent with the law of our state. The well established presumption is based on our recognition that "an experienced trial judge . . . [is] not likely to be swayed" by improperly admitted evidence. *State* v. *George A.*, supra, 308 Conn. 290; see also *Doe* v. *Carreiro*, 94 Conn. App. 626, 640, 894 A.2d 993 (noting that, "in court trials, judges are expected, more so than jurors, to be capable of disregarding incompetent evidence"), cert. denied, 278 Conn. 914, 899 A.2d 620 (2006). We similarly recognize that trial judges, who, unlike jurors, are well versed in the rules that govern the arguments of counsel during a trial, are also less likely to be influenced by improper comments or arguments made by counsel during a bench trial.[12]

[11] Courts have recognized that this presumption can be overcome if the defendant can establish that the trial court was both influenced and prejudiced by the impropriety. See, e.g., *United States* v. *Stinefast*, 724 F.3d 925, 931 (7th Cir. 2013) ("[t]o overcome this presumption of conscientiousness on the part of [federal] district [court] judges, a party must present some evidence that the statement influenced the court's [decision making]"); see also *United States* v. *Weldon*, supra, 384 F.2d 774 ("appellate courts may presume that improper evidence and comments have been rejected when the trial is to the [c]ourt alone, at least absent a showing of substantial prejudice"). We have similarly recognized this principle in the purely evidentiary context. See *Ghiroli* v. *Ghiroli*, 184 Conn. 406, 408–409, 439 A.2d 1024 (1981).

[12] The Appellate Court has applied a similar concept, the broader presumption that the trial court did not act in error, to conclude that alleged prosecu-

In the present case, following defense counsel's objection to the prosecutor's remarks, the trial court acknowledged the concerns that motivated the objection and expressly stated that it would not consider the prosecutor's statements when rendering its decision. The trial court also noted that, had the prosecutor's comments been made during a jury trial, the court would have instructed the jurors that it was their recollection of the evidence that controlled and that they should disregard "anything that the lawyers say [that] is at odds with their recollection . . . ." When, as here, a trial court implicitly sustains an objection to a prosecutor's comment and expressly states that it will not consider the challenged comment when arriving at its decision, a defendant is unlikely to meet his burden of establishing that he was deprived of his right to a fair trial.[13] Given that the record in the present case is devoid of any evidence that the trial court failed to follow its own instructions, we conclude that the defendant has failed to meet this burden.

torial impropriety during a bench trial did not deprive a defendant of a fair trial. See, e.g., *State* v. *John M.*, 87 Conn. App. 301, 321 n.15, 865 A.2d 450 (2005) (citing *Carothers* v. *Capozziello*, 215 Conn. 82, 105, 574 A.2d 1268 (1990)), aff'd, 285 Conn. 822, 942 A.2d 323 (2008).

[13] The defendant argues that the trial court's express commitment to ignore the prosecutor's statement concerning Jackson's testimony was "inadequate to protect against" the prejudicial impact of the comment. According to the defendant, the prosecutor has "far more inherent credibility with the court than an average person," and, as a result, "[t]he trial court would be especially inclined to believe [the prosecutor's] assertions or recollection of . . . Jackson's statements than to believe . . . Jackson herself." We firmly reject the defendant's suggestion that the trained and experienced trial judge was incapable of acting as a fair and impartial finder of fact in the present case. In jury trials, we presume that the jury follows the curative instructions of the trial court regarding references by counsel to facts not in evidence. See, e.g., *State* v. *McCoy*, 331 Conn. 561, 573–74, 206 A.3d 725 (2019). "It would be anomalous . . . to hold that an experienced trial . . . judge cannot similarly disregard evidence that has not properly been admitted." *Ghiroli* v. *Ghiroli*, 184 Conn. 406, 408–409, 439 A.2d 1024 (1981); see also *Harris* v. *Rivera*, supra, 454 U.S. 346 ("surely we must presume that [trial judges] follow their own instructions when they are acting as [fact finders]").

Although the trial court's statements provide us with the requisite assurance that the defendant was not deprived of his right to a fair trial, we recognize that some of the *Williams* factors weigh in the defendant's favor. The state concedes in its brief that the prosecutor's comment was uninvited by the defendant and that our prior decisions have characterized cases that turn entirely on the credibility of the sexual assault complainant as "not particularly strong . . . ." See, e.g., *State* v. *Jones*, 320 Conn. 22, 45, 128 A.3d 431 (2015). We further acknowledge that the statement at issue relates directly to the credibility of R's testimony and is, as a result, central to a critical issue in the case. See *State* v. *Maguire*, 310 Conn. 535, 561–62, 78 A.3d 828 (2013). Finally, to the extent that the allegedly improper statement was not based on a reasonable inference from Jackson's testimony, it could be considered severe. See *State* v. *Singh*, 259 Conn. 693, 717–18, 793 A.2d 226 (2002).

Nevertheless, these factors are insufficient to establish that the prosecutor's single comment deprived the defendant of a fair trial under the circumstances. See *State* v. *Wilson*, 308 Conn. 412, 450, 64 A.3d 91 (2013) (noting that one *Williams* factor was "ultimately dispositive of the issue of harmfulness"); see also *State* v. *Pereira*, 72 Conn. App. 545, 563, 805 A.2d 787 (2002) (recognizing that *Williams* factors "are nonexhaustive, and do not serve as an arithmetic test for the level of prejudice flowing from misconduct"), cert. denied, 262 Conn. 931, 815 A.2d 135 (2003). As we discussed previously in this opinion, the trial court's statements in response to the prosecutor's remark, as well as the absence of any evidence that the trial court considered the remark when arriving at its decision, demonstrate that the finder of fact was uninfluenced by the alleged prosecutorial impropriety. The defendant's claim that he was deprived of a fair trial, therefore, fails.

III

We next address the defendant's two claims concerning the sufficiency of the evidence presented at trial. First, the defendant claims that he is entitled to a judgment of acquittal on all counts because the state's evidence was insufficient to prove that he engaged in the underlying criminal conduct described by R during her forensic interview and trial testimony. According to the defendant, no reasonable trier of fact could have found that he inappropriately touched R in 2015, because he presented three witnesses who contradicted R's testimony and "no witnesses confirmed [R's] allegations . . . ." Second, the defendant claims that the evidence was insufficient to establish that he acted with the specific intent necessary to be convicted of sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A). Specifically, the defendant argues that the evidence was insufficient to prove beyond reasonable doubt that he acted with the intent to degrade or humiliate R, or that he gained sexual gratification from engaging in the conduct in question. The state disagrees, arguing that the evidence presented at trial was sufficient to support the defendant's convictions. We agree with the state.

The following additional facts and procedural history are relevant to our consideration of the defendant's claims. At trial, the defendant testified on his own behalf and presented the testimony of his former girlfriend, Chantell Sinclair, and his sister, Claudia Smith. Both Sinclair and Smith testified that R experienced dry and irritated skin around her vaginal area. Sinclair specifically testified that on one occasion, R told her and the defendant that the skin around her vaginal area was "burning." According to Sinclair, the defendant supervised R as she cleaned herself, but he did not touch her directly. The defendant, in his testimony, denied inappropriately touching R in 2015, and accused both R and her mother of fabricating the allegations.

At the close of the state's case-in-chief, defense counsel moved for a judgment of acquittal on counts one through five, claiming that the state's evidence was insufficient to support a conviction of sexual assault in the first, third, or fourth degree.[14] The court granted the defendant's motion as to both counts of sexual assault in the third degree, counts two and three, and denied his motion as to the single count of sexual assault in the first degree, count one, and the two counts of sexual assault in the fourth degree, counts four and five.[15] At the close of evidence, defense counsel renewed the motion for a judgment of acquittal as to counts one, four, and five. The trial court again denied the motion.

In its oral decision, the trial court articulated its factual findings and identified the evidentiary basis for its verdict. The trial court began by noting that "the state has proven beyond a reasonable doubt that the defendant . . . did engage . . . in the behavior described by R in her testimony and in her forensic interview." In reaching this conclusion, the trial court stated that it "found R's account to be credible and . . . rejected the contrary testimony offered by the defendant . . . ." Relying on R's account of the defendant's conduct, the trial court concluded that the state's evidence was sufficient to establish the defendant's guilt beyond a reasonable doubt of sexual assault in the first degree, contained in count one, sexual assault in the fourth degree, contained in count four, and two counts of risk of injury to a child, contained in counts six and seven.

[14] Prior to closing arguments, defense counsel also moved for a judgment of acquittal on counts six and seven, arguing that the risk of injury statute was unconstitutionally vague as applied to the defendant's conduct. The court reserved ruling on the vagueness claim until after closing arguments. The defendant's constitutional vagueness claims are addressed subsequently in this opinion.

[15] Count four related to the defendant's contact with R's vagina and count five related to his contact with her breasts.

"In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Citations omitted; internal quotation marks omitted.) *State* v. *Morgan*, 274 Conn. 790, 799–800, 877 A.2d 739 (2005); see also *State* v. *Rhodes*, 335 Conn. 226, 233, 249 A.3d 683 (2020) (noting that defendant asserting insufficiency claim "carries a difficult burden" (internal quotation marks omitted)).

Moreover, it is well established that "[w]e may not substitute our judgment for that of the [finder of fact] when it comes to evaluating the credibility of a witness. . . . It is the exclusive province of the [finder] of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review." (Internal quotation marks omitted.) *State* v. *Andrews*, 313 Conn. 266, 323, 96 A.3d 1199 (2014).

We first consider the defendant's broad claim that the evidence was legally insufficient to sustain his conviction on all counts. In support of this claim, the defendant relies entirely on the fact that R's testimony was uncorroborated and was contradicted by three "third party witnesses . . . ." According to the defendant, the

sheer numerical superiority of contradictory testimony rendered the state's evidence insufficient as a matter of law. The defendant's claim is wholly without merit.

We have repeatedly recognized that "[t]he issue [of guilt] is not to be determined solely by counting the witnesses on one side or the other." (Internal quotation marks omitted.) *State* v. *Hodge*, 153 Conn. 564, 573, 219 A.2d 367 (1966); see also *State* v. *Nerkowski*, 184 Conn. 520, 525 n.5, 440 A.2d 195 (1981). The testimony of "a single witness is sufficient to support a finding of guilt beyond a reasonable doubt." *State* v. *Whitaker*, 215 Conn. 739, 757 n.18, 578 A.2d 1031 (1990). In sexual assault cases specifically, we have recognized that a victim's uncorroborated testimony, in and of itself, can be sufficient to establish a defendant's guilt. See, e.g., *State* v. *Stephen J. R.*, 309 Conn. 586, 595, 72 A.3d 379 (2013) ("it is well established that a victim's testimony need not be corroborated to be sufficient evidence to support a conviction"); see also *State* v. *Monk*, 198 Conn. 430, 433, 503 A.2d 591 (1986).

In the present case, the trial court credited R's testimony and discredited the contradictory testimony provided by the defendant, two of his former girlfriends, and his sister. The trial court made its credibility determination clear in its oral ruling, stating that it "found R's account to be credible and . . . rejected the contrary testimony offered by the defendant in his own testimony, by witnesses called by him, and in his cross-examination of other witnesses."[16] In crediting R's testimony and discrediting the testimony of other witnesses, the trial court acted within its authority as the trier of

[16] The trial court also "conclude[d] that the defendant has testified falsely in asserting that he did not engage in the conduct described by R that forms the factual basis of the allegations in this criminal proceeding. And having reached this conclusion that the defendant has testified falsely, it is proper for this court to carefully consider whether it should rely upon any of the defendant's testimony."

fact. See, e.g., *State* v. *DeMarco*, 311 Conn. 510, 519–20, 88 A.3d 491 (2014) ("[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility" (internal quotation marks omitted)); see also *State* v. *Hodge*, supra, 153 Conn. 572–73. Because R's testimony was sufficient to support the trial court's conclusion that the defendant engaged in the underlying criminal conduct, the defendant's broad sufficiency claim fails. See, e.g., *State* v. *White*, 155 Conn. 122, 123, 230 A.2d 18 (1967) ("[t]he credibility to be accorded the testimony of the victim was for the [trier of fact] to determine and, if credible, her testimony was sufficient to establish the commission of the crime").

We next consider the defendant's claim that there was insufficient evidence to prove beyond a reasonable doubt that he acted with the intent necessary to be convicted of sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A). Under § 53a-73a (a), "[a] person is guilty of sexual assault in the fourth degree when . . . (1) [s]uch person subjects another person to sexual contact who is (A) under thirteen years of age and the actor is more than two years older than such other person . . . ." General Statutes § 53a-65 (3) defines "[s]exual contact" as "any contact with the intimate parts of a person for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person." Section 53a-65 (8), in turn, defines "[i]ntimate parts" to include, inter alia, "the genital area . . . ." In the present case, the burden was, therefore, on the state to prove beyond a reasonable doubt that the defendant had contact with R's genital area for the purpose of sexual gratification or for the

purpose of degrading or humiliating her. See, e.g., *State* v. *Michael H.*, 291 Conn. 754, 760, 970 A.2d 113 (2009).

The defendant claims that the evidence presented at trial was insufficient to establish that he acted with the intent to degrade or humiliate R, or that he acted for the purpose of sexual gratification. Specifically, the defendant argues that the evidence presented demonstrates only that, if the conduct did occur, it was as a result of his concern for R's health. Based on our review of the record, we conclude that the evidence presented at trial was sufficient to support the trial court's conclusion that the defendant acted with the intent to degrade or humiliate R or acted for the purpose of sexual gratification.

It is well established that "[i]ntent may be, and usually is, inferred from the defendant's verbal or physical conduct. . . . Intent may also be inferred from the surrounding circumstances. . . . The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . Intent may be gleaned from circumstantial evidence such as . . . the events leading up to and immediately following the incident. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Internal quotation marks omitted.) *State* v. *Saez*, 115 Conn. App. 295, 302–303, 972 A.2d 277, cert. denied, 293 Conn. 909, 978 A.2d 1113 (2009); see also *State* v. *Lamantia*, 336 Conn. 747, 756–57, 250 A.3d 648 (2020).

In the present case, R's testimony alone was sufficient to support the trial court's conclusion that the defendant made contact with R's intimate parts for the purpose of degrading or humiliating her. See, e.g., *State* v. *Michael H.*, supra, 291 Conn. 760–61 (testimony of sexual assault victim provided "sufficient evidence that the

defendant had contact with the intimate parts of [the victim] for the purposes of sexual gratification"). As the trial court aptly noted in its decision, "[t]he evidence in this case proves that the defendant forced [R] to lie completely unclothed on his bed, sometimes with [the defendant's] girlfriends present, so that he, the defendant, could place his hands and a wash cloth in, and on, R's genital area, at times pulling apart R's external genitalia to look inside, knowing full well from [R's] words and actions that this conduct embarrassed her and that she wished for him to stop doing it." Viewing the evidence in a light most favorable to sustaining the verdict, we agree with the trial court and conclude that the defendant's physical conduct and his continued abuse of R, despite her repeated requests that he stop, supports a "reasonable and logical inference . . . that the defendant's touching of R was undertaken for the purpose of humiliating and degrading her." See, e.g., *State* v. *Michael H.*, supra, 760–61; see also *State* v. *McGee*, 124 Conn. App. 261, 263, 273, 4 A.3d 837 (evidence that defendant touched and twisted victim's breast during robbery was sufficient to support finding that defendant intended to degrade or humiliate victim), cert. denied, 299 Conn. 911, 10 A.3d 529 (2010), cert. denied, 563 U.S. 945, 131 S. Ct. 2114, 179 L. Ed. 2d 908 (2011); *In re Mark R.*, 59 Conn. App. 538, 542, 757 A.2d 636 (2000) (evidence that defendant attempted to pull down victim's pants and "smacked the victim's buttocks more than once . . . in a school hallway in front of several people . . . support[ed] a reasonable inference" that defendant intended to degrade or humiliate victim).

Moreover, we also conclude that the state's evidence was sufficient to support the trial court's finding that the defendant acted for the purpose of sexual gratification. In its decision, the trial court stated that the defendant's contact with R's vaginal area and his penetration

of R's vagina supported an inference that the defendant's conduct was "done for the defendant's sexual gratification . . . ." The court also noted that "the repeated and almost ritualistic nature of the defendant's conduct in this case makes an inference of sexual gratification a particularly reasonable one." Having reviewed the record, we agree with the trial court and conclude that R's trial testimony and forensic interview support a reasonable inference that the defendant engaged in the conduct in question for the purpose of sexual gratification. See *State* v. *Michael H.*, supra, 291 Conn. 760–61 (defendant's intent to commit sexually gratifying act was inferred in case in which defendant rubbed his hands over minor victim's genital area); *State* v. *Montoya*, 110 Conn. App. 97, 103, 954 A.2d 193 (defendant's touching of minor victim's vagina constituted evidence of intent to commit sexually gratifying act), cert. denied, 289 Conn. 941, 959 A.2d 1008 (2008); see also *State* v. *John O.*, 137 Conn. App. 152, 159, 47 A.3d 905, cert. denied, 307 Conn. 913, 53 A.3d 997 (2012).

For the foregoing reasons, we conclude that the evidence was sufficient to support the defendant's convictions.

IV

Finally, the defendant claims that the statutes criminalizing sexual assault in the first degree, § 53a-70 (a) (2), and risk of injury to a child, § 53-21 (a) (2), are unconstitutionally vague as applied to his conduct, in violation of his right to due process.[17] Specifically, the

[17] It is unclear if the defendant intended to raise his vagueness claim under both the state and federal constitutions. In one sentence in his brief, the defendant states that the relevant statutes are vague as applied to him "[e]ven under a strictly federal analysis . . . ." The defendant's brief is devoid of any reference to the state constitution, and defense counsel did not refer to a state constitutional claim during oral argument before this court. Given the defendant's failure to sufficiently allege a state constitutional claim under *State* v. *Geisler*, 222 Conn. 672, 685, 610 A.2d 1225 (1992), we only consider his federal constitutional vagueness claim. See, e.g., *State* v. *Wilchinski*, 242 Conn. 211, 217 n.7, 700 A.2d 1 (1997). We note, however,

defendant claims that neither statute provided him with adequate notice that the conduct underlying his convictions was criminal.[18] In support of his argument, the defendant contends that his conduct was the product of a good faith concern about R's hygiene and that no reasonable person could have been aware that the conduct was criminally prohibited. In response, the state argues that neither statute is unconstitutionally vague as applied to the defendant because the plain language of those statutes, coupled with relevant judicial decisions, provide fair and adequate notice that the defendant's conduct was criminal. The state also argues that the facts of this case demonstrate that the defendant had actual notice that his conduct was prohibited by statute. We agree with the state and conclude that neither statute is unconstitutionally vague as applied to the defendant's conduct because he had fair and

that "we have applied the same analysis to vagueness claims brought pursuant to both the state and the federal constitutions." *State* v. *Ward*, 306 Conn. 718, 742 n.15, 51 A.3d 970 (2012).

[18] "To demonstrate that [a statute] is unconstitutionally vague as applied to him, the [defendant must] . . . demonstrate beyond a reasonable doubt that [he] had inadequate notice of what was prohibited or that [he was] the victim of arbitrary and discriminatory enforcement." (Internal quotation marks omitted.) *State* v. *Winot*, 294 Conn. 753, 759, 988 A.2d 188 (2010). On a single page in his brief, the defendant appears to raise a claim under the second prong of the as applied vagueness test, that is, the guarantee against arbitrary and discriminatory law enforcement. In support of this claim, the defendant argues that the statutes at issue could criminalize otherwise innocent conduct, such as the medical examination of a child or the changing of an infant's diaper. To the extent that the defendant claims that he is a victim of arbitrary enforcement under the statutes, his claim fails. As we explain in greater detail subsequently in this opinion, the hypothetical applicability of these statutes to conduct unrelated to the defendant's own actions is irrelevant to our consideration of whether the statutes were unconstitutionally vague as applied to the defendant's conduct. See *State* v. *Josephs*, 328 Conn. 21, 31–32, 176 A.3d 542 (2018). Because the defendant fails to argue that *he* was the victim of arbitrary or discriminatory enforcement, we only consider his claim that the statutes were unconstitutionally vague as applied to his conduct because they failed to provide him with adequate notice that his conduct was criminally prohibited.

adequate notice that his conduct was criminally proscribed.

The following additional facts and procedural history are relevant to our consideration of the defendant's claim. Prior to closing arguments, defense counsel moved for a judgment of acquittal on the risk of injury charges in counts six and seven, arguing that § 53-21 (a) (1) and (2) were unconstitutionally vague as applied to the defendant's conduct. The trial court reserved ruling on the defendant's vagueness claim, and, following closing arguments, defense counsel extended the defendant's vagueness challenge to the first degree sexual assault charge under § 53a-70 (a) (2).

After rendering its verdict, the trial court denied the defendant's motions, reasoning that "the language of each of these statutes, either alone or in conjunction with judicial gloss already placed on certain portions of language in these statutes by the Connecticut courts, [put] the defendant . . . on notice that the particular behavior alleged in this case was prohibited, and, as to this particular behavior, the defendant was not at risk of being subject to standardless law enforcement." The trial court further noted that "[t]he defendant himself admitted in his testimony that he knew any touching of his daughter of the nature she described was inappropriate. In light of that admission and the facts presented in the case and found credible by the court, the court concludes that the defendant has failed to meet his heavy burden of demonstrating beyond a reasonable doubt that he had inadequate notice of what was prohibited or that he was the victim of arbitrary enforcement."[19]

[19] The trial court vacated the defendant's conviction on the seventh count of the information, which charged him with risk of injury to a child in violation of § 53-21 (a) (1), on double jeopardy grounds. The defendant's vagueness claim is, therefore, limited to his conviction on count one, under § 53a-70 (a) (2), and on count six, under § 53-21 (a) (2).

Before addressing the merits of the defendant's claim, we note the legal principles that guide our decision. "A party attacking the constitutionality of a validly enacted statute bears the heavy burden of proving its unconstitutionality beyond a reasonable doubt . . . [and we] indulge in every presumption in favor of the statute's constitutionality . . . ." (Citations omitted.) *State* v. *Floyd*, 217 Conn. 73, 79, 584 A.2d 1157 (1991). "The determination of whether a statutory provision is unconstitutionally vague is a question of law over which we exercise de novo review." *State* v. *Winot*, 294 Conn. 753, 758–59, 988 A.2d 188 (2010).

"The vagueness doctrine derives from two interrelated constitutional concerns. . . . First, statutes must provide fair warning by ensuring that [a] person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second, in order to avoid arbitrary and discriminatory enforcement, statutes must establish minimum guidelines governing their application." (Citations omitted; internal quotation marks omitted.) *Board of Selectmen* v. *Freedom of Information Commission*, 294 Conn. 438, 458, 984 A.2d 748 (2010); see also *State ex rel. Gregan* v. *Koczur*, 287 Conn. 145, 156, 947 A.2d 282 (2008) ("[t]he void for vagueness doctrine embodies two central precepts: the right to fair warning of the effect of a governing statute . . . and the guarantee against standardless law enforcement" (internal quotation marks omitted)).

"For statutes that do not implicate the especially sensitive concerns embodied in the first amendment, we determine the constitutionality of a statute under attack for vagueness by considering its applicability to the particular facts at issue." (Internal quotation marks omitted.) *State* v. *Jones*, 215 Conn. 173, 180, 575 A.2d 216 (1990). To prevail on such a claim, the defendant must "demonstrate beyond a reasonable doubt that [he]

had inadequate notice of what was prohibited or that [he was] the victim of arbitrary and discriminatory enforcement. . . . If the meaning of a statute can be fairly ascertained a statute will not be void for vagueness since [m]any statutes will have some inherent vagueness, for [i]n most English words and phrases there lurk uncertainties. . . . References to judicial opinions involving the statute, the common law, legal dictionaries, or treatises may be necessary to ascertain a statute's meaning to determine if it gives fair warning." (Internal quotation marks omitted.) *State* v. *Winot*, supra, 294 Conn. 759.

"The proper test for determining [whether] a statute is vague as applied is whether a reasonable person would have anticipated that the statute would apply to his or her particular conduct. . . . The test is objectively applied to the actor's conduct and judged by a reasonable person's reading of the statute . . . . [O]ur fundamental inquiry is whether a person of ordinary intelligence would comprehend that the defendant's acts were prohibited . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Bloom*, 86 Conn. App. 463, 469, 861 A.2d 568 (2004), cert. denied, 273 Conn. 911, 870 A.2d 1081 (2005); see also *State* v. *Pickering*, 180 Conn. 54, 61, 428 A.2d 322 (1980) (noting that "a penal statute may survive a vagueness attack solely upon a consideration of whether it provides fair warning").

In the present appeal, the defendant claims that both §§ 53a-70 (a) (2) and 53-21 (a) (1) are unconstitutionally vague as applied to his conduct because neither statute provided him with adequate notice that his conduct, as described by R, was criminally prohibited. We disagree and conclude that the language of both statutes and the relevant judicial decisions interpreting them provide a person of ordinary intelligence with fair notice that the digital penetration of a minor's vagina and the touch-

ing of a minor's vagina with a rag in a sexual and indecent manner are criminally prohibited.

As to the defendant's claim concerning his conviction of sexual assault in the first degree, § 53a-70 (a) (2) criminally prohibits a person from engaging "in sexual intercourse with another person . . . [who] is under thirteen years of age [when] the actor is more than two years older than such person . . . ." Section 53a-65 (2) defines "[s]exual intercourse" as, inter alia, "vaginal intercourse," and specifies that "[p]enetration, however slight, is sufficient to complete vaginal intercourse . . . ." In our prior decisions interpreting § 53a-70, we have recognized that "digital penetration . . . of the genital opening . . . is sufficient to constitute vaginal intercourse." (Emphasis omitted.) *State* v. *Albert*, 252 Conn. 795, 806–807, 750 A.2d 1037 (2000). The trial court in this case specifically concluded that "R's testimony . . . established that the defendant penetrated [her]." Furthermore, during her forensic interview, R stated that her vagina "ache[d] hard" as a result of the defendant's "dig[ging] through" the "deep dark" part. Given the plain language of § 53a-70 (a) (2), and the relevant judicial gloss that has been placed on that statute, we conclude that a person of ordinary intelligence would know that the defendant's digital penetration of R's vagina was criminally prohibited.

As to the risk of injury statute, § 53-21 (a) (2) prohibits "contact with the intimate parts . . . of a child under the age of sixteen years . . . in a sexual and indecent manner likely to impair the health or morals of such child . . . ." The definition of "[i]ntimate parts" contained in § 53a-65 (8) includes the "genital area . . . ." Our prior "opinions pursuant to § 53-21 make it clear that the deliberate touching of the private parts of a child under the age of sixteen in a sexual and indecent manner is violative of [the] statute." *State* v. *Pickering*, supra, 180 Conn. 64. In the present case, the trial court

expressly found that the defendant's conduct involved deliberate touching of this nature. In reaching this conclusion, the trial court reasoned: "[T]he touching by the defendant of R was sexual in nature . . . [and] indecent; that is, in doing what the defendant did to his ten year old daughter, the defendant engaged in conduct that is offensive to good taste and public morals. The court concludes that the defendant's touching of R was not innocent, was not accidental, and was not inadvertent."[20] As was the case in *Pickering*, "[t]his is not a situation where the state is holding an individual criminally responsible for conduct he could not reasonably understand to be proscribed." (Internal quotation marks omitted.) *State* v. *Pickering*, supra, 64–65. The defendant's conduct, as described by the trial court, falls well within the scope of § 53-21, and, as a result, the statute may be constitutionally applied to him.

For the foregoing reasons, we conclude that the defendant has failed to demonstrate that §§ 53a-70 (a) (2) and 53-21 (a) (1) do not provide fair warning that the digital penetration of a minor's vagina in a sexual and indecent manner is criminally prohibited. The defendant's constitutional vagueness claims, therefore, fail.

The judgment is affirmed.

In this opinion the other justices concurred.

[20] In support of his claim that he lacked adequate notice, the defendant contends that his conduct was based on "mistaken hygiene concerns," and, because he believed that his conduct was appropriate, he had no reason to suspect that he was engaging in a criminal act. The trial court, however, expressly rejected the defendant's argument that his conduct was motivated by an innocent desire to help R. In reaching this conclusion, the trial court found: "[T]he defendant was not acting under a mistaken belief or other excuse because he knew from doctors and [employees of the department] that what he was doing to R was inappropriate and not medically or hygienically justified when she was [three] years old and because he himself admitted in his testimony that he knew it would be wrong to do it when she was ten."